Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent brought this action against petitioners under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which prohibit false statements "in connection with the purchase or sale of any security." The suit arises from petitioners' investment newsletter advisory. Petitioners offered no personalized investment advice, did not trade in the relevant stock, and owed no fiduciary duty to the issuer or any other party. The Fourth Circuit nonetheless held that petitioners could be held liable under Section 10(b), and the court affirmed both a significant monetary fine and an injunction broadly prohibiting any future violation of the Rule. The court of appeals further held that the First Amendment presented no obstacle to respondent's claim. By contrast, in a parallel state law securities fraud investigation brought by the State of Maryland over the *identical* statement, that state's highest court held that constitutional protections applied.

The Questions Presented are:

1. Whether Section 10(b) and Rule 10b-5 apply to speech by a party that offers no personalized investment advice, does not trade in the relevant stock, and owes no applicable fiduciary duty.

2. Whether such a case may proceed without the protections of the First Amendment, such as independent appellate review of factual findings, a showing of reckless disregard for the truth based on clear and convincing evidence, and a prohibition on sweeping prior restraints on speech.

CORPORATE DISCLOSURE STATEMENT

Pirate Investor LLC changed its corporate name to Stansberry & Associates Investment Research, LLC on October 24, 2005. Agora, Inc. is the parent corporation of Stansberry & Associates Investment Research, LLC. No publicly held company owns 10 percent or more of Agora, Inc. or Stansberry & Associates Investment Research, LLC.

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The decision of the United States Court of Appeals for the Fourth Circuit is reported at 580 F.3d 233 and is reprinted in the Appendix ("App.") at 1a. The decision of the United States District Court for the District of Maryland is unpublished and reprinted at App. 52a.

JURISDICTION

The Fourth Circuit entered its judgment on September 15, 2009 and denied rehearing on November 13, 2009. App. 151a. The Chief Justice subsequently extended the time to file this petition to and including March 26, 2010. App. 197-98a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ." U.S. CONST. amend. I.

Section 10(b) of the Securities Exchange Act of 1934 provides in relevant part: "It shall be unlawful for any person, directly or indirectly ... (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b).

Rule 10b-5 provides, in relevant part: "It shall be unlawful for any person, directly or indirectly ... (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

STATEMENT OF THE CASE

Petitioners advertised and published an investment newsletter advisory predicting that the price of a particular stock would rise. Petitioners did not trade in the stock; provided no personalized investment advice; and owed no applicable fiduciary duty. Alleging that a statement in the advisory was false, respondent charged petitioners with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The district court and Fourth Circuit held that petitioners' speech was actionable and that the First Amendment was no obstacle to the claim. In parallel litigation, the highest court of Maryland held that the identical publications triggered First Amendment protections.

1. Petitioners publish investment advice. At the time of the events giving rise to this case, in May 2002, petitioner Pirate Investor LLC ("PIL") had approximately 20,000 subscribers. By trial in 2005, that number had risen to 120,000; it has roughly

doubled since. PIL is owned by Agora, Inc., which publishes dozens of investment, health, and travel newsletters. In May 2002, it had approximately 450,000 paid subscribers. By trial, that figure had grown to 650,000. Its book divisions include Les Belles Lettres and Pickering & Chatto, publishers of classics and academic texts.

Petitioner Frank Porter Stansberry is the editor of a PIL publication, *Porter Stansberry's Investment Advisory*. *Barron's* has cited Stansberry as a "highly regarded" writer who does not "mince his words" and commended him as "remarkably prescient" for his predictions of impending turmoil in the financial sector. *See* Alan Abelson, *Au Revoir or Goodbye?*, BARRON'S, July 14, 2008, at 5.

The particular segment of the publishing industry in which petitioners participate is well known for its hyperbole. Jim Cramer of CNBC is a high-profile example. As the sub-headline on a *Worth* magazine article on this genre explains: "Welcome to the world of investing newsletters, where YOU HAVE TO SHOUT TO BE HEARD!" *See* Mike Steere, *The Genius, the Guru & the Grumpy Old Men*, WORTH, November 1996. For example, in June 2008, Freddie Mac and Fannie Mae were trading at $25.29 and $27.59, respectively. Stansberry, however, as noted by *Barron's*, exhorted his readers to short sell those stocks in a report entitled *Freddie Mac and Fannie Mae Are Going To Zero: How to Protect Yourself from the Greatest Financial Calamity of our Lives*. *See* PORTER STANSBERRY'S INVESTMENT ADVISORY, June 2008, available at http://www.stansberryresearch.com/

secure/psi/issues/html/200806PSI_issue.asp. By early September 2008, the stocks fell below $1.00 and have traded thereabout to this day.

This effort by respondent to extend the jurisdiction of Section 10(b) to the journalism of investment newsletters arises from Stansberry's reporting on USEC Inc., a public company that imports uranium for nuclear power plants through a joint U.S.-Russian program. In 2002, Stansberry interviewed USEC's head of investor relations, Steven Wingfield. Stansberry did not know much about USEC, but he was looking for growth companies to recommend to his subscribers. For over an hour, the two men discussed company fundamentals, USEC's prospects, and a pending pricing agreement with its Russian supplier that would cut USEC's costs for uranium and boost its earnings. They also spoke about an upcoming summit on May 23-25 between Presidents Bush and Putin, which USEC hoped would produce the required governmental approvals for the pricing agreement.

USEC had asked the U.S. government to place the pricing agreement on the agenda for the summit and in mid-April had raised with its creditor Bank of America a possible connection between the summit and the approval of the agreement. Handwritten notes on a Bank of America document observed: "Maybe May @ undersecretary levels." USEC's private confidence that the approval was imminent was reflected in its public statements as well. On April 25, USEC had told investors in a conference call that it was "look[ing] forward" to approval of the

agreement in the "near future" and that "signals from the U.S. government indicate that approval is near."

As his interview with Wingfield was ending, Stansberry said he would probably not include USEC as a recommended stock in his newsletter since it did not fit the growth-oriented technology enterprises he followed. According to Stansberry, Wingfield became agitated and blurted out something Stansberry remembers as the somewhat nebulous but impetuous statement: "Watch the stock on May 22nd."

Wingfield acknowledges every aspect of the interview as detailed by Stansberry except the "May 22nd" comment. He denies making that precise statement, but describes his recollection of the conversation as follows:

> Well, like virtually every call that I was taking during that time, that subject [of the agreement] did come up; and, to my recollection, I stayed very close to the language that we used in the conference call about a week before. And that is, that we were working closely with the government, and we were looking forward to approval in the near term. ... [T]here had been some news media coverage of the president's meeting with Putin ... he asked about it, and I said that I – we hoped something positive would come out of the deal.

Before Stansberry published anything based on his interview, USEC's stock began to climb when

President Bush announced from the Rose Garden that the U.S. had agreed to a new arms treaty with Russia. Stansberry came to see Wingfield's statements to reflect USEC's belief that the pricing agreement would be approved in conjunction with the summit, causing the stock market to wake up to the company's improved prospects. He decided to publish his insight because he thought that the world's focus on the Bush-Putin meeting and a possible signing at the summit would result in the revaluing of a "sleeper" stock and create a great opportunity for his readers. He wrote a special report on USEC to be published separately from his newsletter (the "Report") and a promotional e-mail marketing the Report to subscribers (the "E-mail"). He offered the Report for sale at $1,000, a price point that the evidence showed was accepted in the market for the advice of investment newsletters.

The E-mail described the reasons for investing in USEC but did not identify the company by name. It discussed the pending pricing agreement, the new arms treaty, the upcoming summit, and the signals coming from the company which Stansberry interpreted as indicating that the pricing agreement would be approved around the summit. "[B]est of all, because of my source – a senior company executive – I can tell you EXACTLY WHEN the deal will be finalized and announced to the public," Stansberry wrote. App. 157a. He colloquially captioned the E-mail a "'Super Insider' Tip" in what is (as noted above) the brassy, exuberant vernacular commonplace in the newsletter industry.

The four-page Report[1] identified USEC as the company and offered further analysis supporting Stansberry's prediction that the stock, then trading at half of book value, would double when the pricing agreement was approved. Consistent with his understanding of his interview with Wingfield, he wrote in the Report, "A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22nd.'" App. 177a. Stansberry recommended buying the stock before that date to capture the gains he anticipated during the summit.

Stansberry published the E-mail on the evening of May 13 to a list of petitioners' subscribers. Just hours later, Stansberry sent Wingfield both the Report and the E-mail, together with a memorandum he wrote to other newsletter editors at Agora (the "Memorandum"). In the Memorandum, Stansberry stated, "About two weeks ago I stumbled onto some very good information (which is turning out to be correct) about a company called USEC that sells uranium." App. 180a.

Wingfield did not contact Stansberry to raise any concerns about the contents of the Report, the E-mail, or the Memorandum. Nor did USEC issue a press release denying Stansberry's reporting or correcting it as required by New York Stock

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[1] Because he was not recommending USEC in the newsletter that bears his name, Stansberry published the E-mail under a company pen name used regularly by petitioners to market their publications.

Exchange rules when a listed company believes that a public report contains materially-false statements. Only when respondent later deposed Wingfield did he deny that he had told Stansberry to "watch the stock on May 22nd."

Stansberry was far from alone in his views about USEC. Contemporaneous news reports attributed the movement in the company's stock price to a connection between the summit and the pricing agreement. On May 14, in an article entitled "USEC Up 13% on U.S.-Russia Deal To Cut Nuclear Warheads," *The Wall Street Journal* quoted Wingfield saying that "[t]he new pricing agreement will improve our earnings" and predicting approval "com[ing] along soon." On May 15, in an article entitled "USEC Up 10%: US-Russia Arms Deal Continues To Boost Stock," *The Wall Street Journal* quoted an analyst stating "[t]he hope is clearly that – as part of these other talks between the Russia [sic] and the U.S. – the governments will finally approve the tentative agreements USEC has with its Russian trading partner."

The approval of the pricing agreement was not announced on May 22. It was made official a few weeks later on June 19, when USEC's share price closed at $8.39. (It had opened at $6.85 on May 13.)

Unlike advertiser-supported media, newsletters depend on subscriber loyalty and readership renewal to sustain their growth. Because newsletter writers thus only succeed by building long-term relationships with subscribers, Stansberry would offer refunds to anyone who purchased the Report and was not fully

satisfied. Only 18 percent of the 1,217 readers who purchased the Report asked for a refund. Ninety percent of these customers bought a subsequent publication from petitioners or their parent publishing company Agora.

2. Respondent subsequently brought this action seeking monetary relief and an injunction against petitioners under Rule 10b-5, which implements Section 10(b) of the Securities Exchange Act of 1934 and forbids any material "untrue statement," as well as "fraud or deceit," "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In *United States v. O'Hagan*, 521 U.S. 642, 656 (1997), this Court held that to meet the "in connection with" requirement fraud must "coincide" with or be "consummated" or "complete[d]" by the purchase or sale of a security. As the Court further explained in *SEC v. Zandford*, 535 U.S. 813, 821 (2002), fraudulent conduct must "require the sale of securities" to satisfy the "in connection with" clause.

Petitioners argued that because they did not trade stock or owe fiduciary duties to investors who traded stock – controlling facts that were never in dispute – the publications did not meet the "in connection with" requirement under Section 10(b). They also argued that the First Amendment forbade the suit because if the statute were construed to reach pure speech, respondent neither could produce the clear and convincing evidence of "reckless disregard" for the truth required by the "actual malice" rules of *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), nor could secure injunctive relief in light of *Near v. Minnesota*, 283 U.S. 697 (1931).

Petitioners submitted expert testimony from two witnesses who placed the publications in constitutional context. Among other things, the former SEC deputy chief economist testified that information tying approval of the agreement to the summit may have been material but was true, whereas the May 22nd date turned out to be premature but was not material. A journalism professor from Northwestern University saw the provocative, hyperbolic writing characteristic of investment newsletters as a source of their popularity with readers looking for strong opinions colorfully expressed.

Respondent opposed First Amendment protections and in its closing argument claimed the right to prosecute speakers and publishers ranging from *The Wall Street Journal* to university presidents even if they do not trade securities or carry fiduciary duties. When the district court asked, "You would have no problem in suing *The Wall Street Journal* for fraud if, in fact, if there were a column published that said something fraudulent," respondent replied, "We're not barred from suing them now" and later stated:

> The president of a university is giving a speech about a particular stock. ... He doesn't have any holding in the stock. He says the stock is going to pop ... go out and buy it. Is he going to be subject to the securities laws? He may well be if all the elements are met, particularly if the SEC can prove that he knew there

> was no reasonable basis that the stock was [going to pop].

3. The district court held that respondent could state a claim against petitioners under Section 10(b) consistent with the First Amendment. The court believed that petitioners' statements in both the Report and the E-mail amounted to commercial speech entitled to no heightened First Amendment protections. Further, in the court's view, the speech was analogous to a corporation's communications to its own investors to whom it owed fiduciary duties, which was held to satisfy the "in connection with" requirement in *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 857-58, 860 (2d Cir. 1968). Disregarding the obvious incentives Stansberry had to publish the truth and Wingfield had to please respondent, the court imposed liability, set civil fines of $240,000, disgorged profits, and ordered injunctive relief that simply tracks the language of Rule 10b-5(a) and (b) in prohibiting petitioners from

> violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 ... and Rule 10b-5 ... by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security ... [t]o employ any device, scheme, or artifice to defraud; or ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the

> light of the circumstances under which they were made, not misleading.

App. 115-16a.

4. On petitioners' appeal, the Fourth Circuit affirmed. It found that Rule 10b-5's "in connection with" clause was satisfied on the theory that petitioners' readers traded in USEC shares and that this trading was required for the "reputational gain" the panel contended that petitioners needed to "maximize" sales of the Report. The court also held that petitioners intended to induce securities transactions and that they published the Report to readers who were likely to rely on it. Although the Fourth Circuit's construction of Section 10(b) required the statute's application to pure expression, the court held the First Amendment had no role to play in the case because the First Amendment does not protect fraudulent speech. The court ruled that respondent was not required to satisfy the heightened evidentiary burdens of *New York Times*. Further, the Fourth Circuit declined to review the entire record *de novo* pursuant to *Bose v. Consumers Union of U.S.*, 466 U.S. 485 (1984). For the same reasons it rejected application of the actual malice rules of *New York Times* and independent appellate review under *Bose*, the Fourth Circuit found no constitutional infirmity with the district court's permanent injunction. It stayed its mandate pending certiorari, however, to enable this Court to consider the "substantial" questions, *see* Fed. R. App. P. 41(d)(2)(A), presented in this case.

5. Also in 2002, the Maryland Securities Commissioner issued subpoenas to petitioners for subscriber information pursuant to an investigation of the E-mail and the Report under the antifraud and registration provisions of the state securities laws. The state's highest court, the Maryland Court of Appeals, agreed with petitioners that a heightened standard applied, holding that the "protective umbrella of the First Amendment" prevented enforcement of the subpoenas absent a compelling need for the information, which the state could not supply. *Lubin v. Agora, Inc.*, 882 A.2d 833, 846 (Md. 2005) (App. 143a). The court rejected the Commissioner's arguments that "First Amendment rights are not implicated" by the case and that petitioners' publications were only "commercial expression directed solely to [petitioners'] economic interest" and were unprotected because they were misleading. After the court held that the First Amendment applied to petitioners' speech activity, the Commissioner brought no further proceedings.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to review the Fourth Circuit's significant expansion of the application of Section 10(b) of the Securities Exchange Act of 1934, which was held for the first time in this case to reach mere impersonal investment advice. That ruling conflicts with this Court's precedents applying the statute's "in connection with" requirement, as well as with the established body of lower court precedent that had previously given rise to a settled understanding among publishers regarding Section 10(b)'s cabined scope. As one analysis of the ruling

stated, "The Fourth Circuit's decision ... reads existing precedent as broadly as possible in interpreting Section 10(b)'s 'in connection with' requirement. ... Thus, *all speakers*, from pundits commenting on corporate developments to advertising copyrighters, *must be wary*."[2] This case has thus been closely watched because of the radical departure it represents, as *The New York Times* recognized: "If the suit is successful, it will be the first to use the securities laws against commentary about a company in which the authors had no financial stake." Adam Liptak, *E-mail Stock Tip Tests Limits of Securities Laws*, N.Y. TIMES, Aug. 3, 2003, at 10.

Certiorari is also warranted because the ruling below conflicts with the precedents of this Court and other circuits holding that speech such as the expression at issue in this case is protected by the First Amendment. In particular, review is warranted of the Fourth Circuit's holdings that the government was not required to prove its case through clear and convincing evidence that petitioners spoke with reckless disregard for the truth; that the court of appeals need not review the trial evidence *de novo*; and that the Constitution permits the entry of an injunction enforceable upon pain of contempt that broadly forbids petitioners in the future from engaging in any speech that violates the court's

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[2] DECHERT LLP, SEC V. PIRATE INVESTOR LLC: EXPANSION OF THE 'IN CONNECTION WITH' REQUIREMENT UNDER EXCHANGE ACT SECTION 10(B) (Jan. 2010), available at http://www.dechert.com/library/White_Collar-FS-SA-01-10-SEC_v_Pirate_Investor_LLC.pdf (emphasis added).

sweeping reading of Section 10(b). At the very least, those significant constitutional concerns counsel in favor of reading the statute narrowly.

I. This Court Should Review The Fourth Circuit's Holding That The Antifraud Provisions Of Section 10(b) Apply To Impersonal Investment Advice By A Party That Does Not Trade In A Stock And Owes No Applicable Fiduciary Duty

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 forbid any material "untrue statement," as well as "fraud or deceit," "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In this case, petitioners received the same payment for the Report regardless of whether any reader purchased USEC stock, as respondent conceded at oral argument when agreeing petitioners received *no* benefit from any trading. Dec. 2, 2008 Tr. 50:8-9 ("The defendants' benefit was getting the thousand dollars [from the sale of the Report]."). In holding that petitioners could nonetheless be held liable, the Fourth Circuit became the first court of appeals to reject the single most significant limitation on the scope of 10(b) liability. The court of appeals held that the statute may be violated by speech in the form of impersonal investment advice by a speaker who does not trade in the relevant stock and who owes no applicable fiduciary duty.

This Court has made clear that the phrase "[i]n connection with the purchase or sale of any security" is "limiting language." *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 38 (1977). But the Fourth Circuit has

used it for the opposite purpose – to adopt a legal rule of unlimited application empowering respondent and private plaintiffs to engage in endless second-guessing of editorial judgments made by publishers and market commentators.

The Fourth Circuit's ruling thus undoes decades of precedent laying down predictable boundaries in securities regulation and for the first time under Section 10(b) exposes pure speech about stocks and public companies to enforcement actions by respondent and to suits for damages by private litigants. The lack of any limiting principle in the Fourth Circuit's ruling makes it applicable not only to impersonal investment advice but to any type of disinterested expression, from newspaper reporting to market commentary on television to streaming financial data on the Internet. All of this speech, like petitioners', is expression conveyed without a fiduciary duty by those who do not trade securities.

Until the decision below, courts had uniformly found the "in connection with" requirement to be satisfied only with respect to statements by parties who participate in securities transactions or who breach duties they owe to investors who participate in such transactions. Every time this Court has reached the "in connection with" requirement, the defendant has engaged in this type of conduct. *See Sup't of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 8 (1971) (trading of securities and breach of fiduciary duty); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972) (breach of fiduciary duty); *O'Hagan*, 521 U.S. at 647, 656 (trading of securities and breach of fiduciary duty); *The Wharf*

(Holdings) Ltd. v. United Int'l Holdings, 532 U.S. 588, 596 (2001) (trading of securities); *Zandford*, 535 U.S. at 823 (breach of fiduciary duty).

The only issue under the "in connection with" clause that has previously been the subject of dispute is whether the nexus between a defendant's allegedly deceptive conduct and his trading or breach of duty is sufficiently close to satisfy the statute. Thus, in *O'Hagan*, this Court held that to meet the "in connection with" requirement fraud must "coincide" with or be "consummated" by the purchase or sale of a security. 521 U.S. at 656. The Court further elaborated in *Zandford*, where it found the "in connection with" requirement was established because the fraudulent acts and securities transactions of a "broker who has a fiduciary duty" to clients "were not independent events" as "each sale was made to further [a] fraudulent scheme" that "coincided with" and "require[d] the sale of securities." 535 U.S. at 820-21, 823.

This Court has accordingly planted Section 10(b) in the world of fiduciary duty and securities trading by the defendant. *See O'Hagan*, 521 U.S. at 656 (finding the "in connection with" requirement satisfied because "the *fiduciary*'s fraud is consummated, not when the *fiduciary* gains the confidential information, but when, without disclosure to his principal, he uses the information to *purchase or sell* securities. The *securities transaction* and the *breach of duty* thus *coincide*" (emphasis added)); *Zandford*, 535 U.S. at 825 (summarizing the Court's "in connection with" cases going back to *Bankers Life* as each involving

"fraudulent scheme[s] in which the *securities transactions* and *breaches of fiduciary* duty coincide" (emphasis added)).

Respondent's claims are exactly the type of garden-variety allegation of commercial fraud this Court has always kept out of Section 10(b) to ensure that the statute "does not incorporate common-law fraud into federal law" as such claims are "already governed by functioning and effective state-law guarantees." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162, 171 (2008). The "fraud" of which petitioners are accused – publishing false information about USEC – is a common-law fraud that (assuming it occurred at all) was "consummated" or "complete" when readers bought the Report, *O'Hagan*, 521 U.S. at 656, and thus does not satisfy the "in connection with" requirement. No "subsequent securities transaction" by any reader was necessary to carry out the alleged fraud. *Id.* at 657.

The Fourth Circuit remade the *O'Hagan*/*Zandford* standard from one in which securities trading is "required" for an alleged fraud into one that considers whether it "maximizes" an alleged fraud. App. 29a, 48a. Under the decision below, the "in connection with" requirement can be satisfied by publishers regardless of a lack of fiduciary duty or a financial interest in stocks if they realize "reputational gain" when readers rely on them to make investment decisions. No other court has ever held that "reputational gain" by writers converts their work into a subject for regulation – under a statute that provides no First Amendment

protections, no less – just as no other court has ever held that the *O'Hagan/Zandford* test is met by a speaker who neither trades stocks nor carries fiduciary duties.

The ruling below similarly conflicts with the Court's repeated efforts, most recently in *Stoneridge*, to prevent the wholesale federalization of common-law fraud through Section 10(b). *See* 552 U.S. at 161 (drawing a distinction between the regulated world of "the securities markets – the realm of financing business" and "the realm of ordinary business operations" not governed by Section 10(b)). In cases such as *Santa Fe Indus. v. Green*, 430 U.S. 462, 478 (1977), and *Dirks v. SEC*, 463 U.S. 646, 664 (1983), the Court has rejected theories of liability that, like the approach of the Fourth Circuit below, are not "easily contained" and have "no limiting principle."

Prior to the decision below, it was rare that such a Section 10(b) claim would even be brought, given the force of the courts' consistent narrowing construction. But when it was, courts uniformly rejected it. *See Hart v. Internet Wire*, No. 01-9259, 2002 U.S. App. LEXIS 21310, *5 (2d Cir. Oct. 10, 2002) ("Plaintiffs allege a kind of deception by Bloomberg that is separated from the statutory mooring of § 10(b)."); *SEC v. Wall St. Publ'g Inst.*, 664 F. Supp. 554, 555-56 (D.D.C. 1986) (publisher had no duty to "speak the full truth" under Section 10(b)), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977) (magazine and author "simply do not fall into any of the categories of non-privity parties

who have been held liable to defrauded purchasers and sellers under Rule 10b-5").

In sum, review is warranted because the opinion below turns the securities laws into a trap whose trigger, for a publisher, is the offense of successfully cultivating loyal readers. Securities transactions by a defendant or a speaker's duty to the market have for nearly eight decades been a principled and practical way to contain the scope of the statute. The Fourth Circuit has abolished these statutory limitations.

II. The Application Of Section 10(b) To Pure Expression Without Any Constitutional Protections Conflicts With This Court's First Amendment Precedents And The Ruling Of The Maryland Court Of Appeals In A Companion Case Based On The Identical Facts

The Fourth Circuit in this case held that petitioners' speech receives no First Amendment protections or constitutional defenses. It shut the constitutional door in a single sentence: "[T]he First Amendment does not shield fraud." App. 49a (citing *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003)).

The Fourth Circuit's rejection of First Amendment protections conflicts with the unanimous Maryland Court of Appeals in *Lubin*, where the state high court, on the identical facts, held that "[t]he First Amendment is implicated ... when regulations deter or interfere with the receipt of information and free flow of ideas." App. 136a. Had the Maryland

Court of Appeals instead applied the reasoning later adopted by the ruling below, it would have concluded that petitioners' speech received no constitutional protection and compelled enforcement of the subpoenas.

Ignoring the ruling of the Maryland court in this companion case, and straining to uphold liability against the "flippant" language of a newsletter genre and a writer it clearly disdained, App. 7a n.5, the Fourth Circuit swallowed the bait offered by respondent: that because petitioners have been accused of fraud, and because fraud may be punished, the Constitution is completely inapplicable to this case.

That bald position conflicts with this Court's application of the First Amendment to strike down the prior restraints on fraudulent speech in *Schneider v. State*, 308 U.S. 147 (1939), *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). The decision below is also at odds with *Telemarketing Assocs.*, 538 U.S. at 612, where this Court considered "the First Amendment's application to individual fraud actions."

The discussion in *Telemarketing* begins with a statement of the Constitution's affirmative role in the case: "The First Amendment protects the right to engage in charitable solicitation." *Id.* at 611. This Court held that regulation of fraud, though a category of speech that can be punished, must be

"responsive to First Amendment concerns." *Id.* at 621. Hearing the case at the motion to dismiss stage, the Court identified subsequent protections that would address these concerns: clear and convincing evidence at trial and independent *de novo* review on appeal. Citing *New York Times* and *Bose*, this Court stated, "Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room" for speech interests. *Id.* at 620. The Solicitor General, as *amicus curiae*, expressed similar sentiments. *See* Brief of United States and Federal Trade Commission as *Amici Curiae* Supporting Petitioner at 13-14, *Telemarketing Assocs.*, 538 U.S. 600 (No. 01-1806).

The fact that fraud is a category of speech that can be punished did *not* render the First Amendment categorically inapplicable in *Schneider*, *Schaumburg*, *Munson*, *Riley*, or *Telemarketing*. The Fourth Circuit therefore approached the issue backwards. The question is not whether specific fraudulent speech is protected. Fraud – like libel or obscenity – is actionable. But pursuing speech as "libelous," "obscene" or "fraudulent" does not end the constitutional inquiry, it only begins it.

The correct starting point in any First Amendment analysis is thus the nature of the speech at issue. This case concerns the publication of disinterested investment advice, a type of speech which is fully shielded by the Constitution. *See Lowe v. SEC*, 472 U.S. 181, 208, 210 n.58 (1985) (construing the Investment Advisers Act of 1940 narrowly to cover only "those who provide personalized advice attuned to a client's concerns").

The question is what protections the First Amendment requires when government challenges the truth of this expression. The Fourth Circuit answered with none at all, a ruling that violates three lines of this Court's jurisprudence. Imposition of damages for alleged falsity in the Report and E-mail without application of the actual malice rules is in conflict with *New York Times* and its progeny; denial of independent appellate review is in conflict with *Bose*; and issuance of a permanent injunction barring future false speech is in conflict with *Near*.

a. The imposition of monetary fines on petitioners' speech in the absence of actual malice protections and independent appellate review is in conflict with the decisions of this Court and the circuit courts

The Fourth Circuit's decision is a direct assault on the constitutional protections created under *New York Times* and *Bose* and warrants certiorari for two separate reasons. First, the opinion conflicts with the precedents of this Court and numerous federal and state courts mandating actual malice requirements and independent appellate review outside of the libel context whenever pure speech on matters of public concern is challenged as false, regardless of the asserted cause of action. Under the destabilizing decision below, speech which would otherwise be covered by these heightened evidentiary and appellate rules has been stripped of protection because the alleged falsity arises under a securities law. Second, the decision jeopardizes the Court's core jurisprudence in the libel and non-libel areas alike by empowering respondent and private plaintiffs to

evade these established constitutional protections through the vehicle of Section 10(b) litigation. A body of law under the First Amendment and a body of law under Section 10(b) applying different standards to the same content cannot co-exist.

Under *New York Times*, speech is protected unless a defendant has knowledge of falsity or "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Under Section 10(b), scienter is established if the defendant acted "intentionally or recklessly" in making a false statement. While the *New York Times* standard requires clear and convincing proof, Section 10(b) only requires preponderance of the evidence. Cases tried under the *New York Times* standard receive on appeal a searching, "independent examination" of the "entire record" under *Bose* to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." 466 U.S. at 499. Scienter determinations under Section 10(b) are reviewed only for clear error.

The *New York Times* standards arose under libel law, but this Court has now applied them to false light (*Time v. Hill*, 385 U.S. 374, 387-88 (1967)); product disparagement (*Bose*, 466 U.S. at 491); and intentional infliction of emotional distress (*Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)). In the circuit courts, heightened First Amendment requirements have been applied to breach of contract (*Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 531 (6th Cir. 2007)); right of publicity (*Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180,

1186 (9th Cir. 2001)); intentional interference with contractual and prospective business relations (*Jefferson County Sch. Dist. No. R-I v. Moody's Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999)); trespass and breach of loyalty (*Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505, 524 (4th Cir. 1999)); and tortious interference (*Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) and *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990)).

While the Fourth Circuit's ruling broadly conflicts with all of this authority, two of these cases specifically involved speech about securities. In *Jefferson County*, the Tenth Circuit, relying on *Hustler*, held that a rating of a school district's bonds could not serve as the basis for claims for intentional interference with contractual and prospective business relations unless it contained statements provably false under First Amendment standards. 175 F.3d at 857-58. In *Compuware*, the Sixth Circuit applied actual malice protections to reports on a public corporation by a financial ratings company. Actual malice was required because the claim against defendant Moody's for breach of contract (the plaintiff also brought a defamation claim) was "dependent on the truth of the rating and the care taken by the publisher during the publication process" and was "intimately tied to speech, expression, and publication." 499 F.3d at 530-31. The issues in petitioners' case are identical – the "truth" of a publication on a public company read by the investing public and the "care taken by the

publisher" – and yet actual malice protections were denied to them. The Sixth Circuit noted the importance of the heightened clear and convincing evidence requirement in affirming summary judgment. *Id.* at 526. But had these same claims been brought pursuant to Section 10(b), under the Fourth Circuit's ruling, no constitutional defenses would apply.

The Fourth Circuit's ruling is also inconsistent with decisions of courts that have utilized First Amendment analysis in dismissing fraud and negligent misrepresentation cases against publishers of disinterested financial information. In *First Equity Corp. v. Standard & Poor's*, 690 F. Supp. 256, 258-59 (S.D.N.Y. 1989) (Mukasey, J.), *aff'd on other grounds*, 869 F.2d 175 (2d Cir. 1989), the court held that "well-established First Amendment principles" required plaintiffs asserting that a publication on corporate bonds constituted common-law fraud "to demonstrate actual malice when seeking to impose liability ... for publication of a non-defamatory misstatement." Similarly, misrepresentation claims by investors have been rejected due to the absence of heightened constitutional protections in the tort. *See Daniel v. Dow Jones*, 137 Misc. 2d 94, 102 (N.Y. Cty. Spec. Term 1987) ("News services ... or more expensive, specialized media ... are instruments for the free flow of all forms of information, and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press."); *Gutter v. Dow Jones*, 490 N.E.2d 898, 901-02 (Ohio 1986) (citing *Bose* in finding that "important First Amendment interests" and "constitutional

constraints" applied because a "contrary result" would have a "staggering deterrent effect on potential purveyors of printed material").

Review of the ruling below is necessary and warranted because the Fourth Circuit's decision will destabilize the substantial body of law already existing under *New York Times* and *Bose* protecting the public's interest in receiving information. The Fourth Circuit has removed from the protective shield of the First Amendment any disinterested expression concerning securities or a public company that might be challenged as false under Section 10(b). The range of potential overlap between speech that is covered by causes of action to which actual malice requirements attach and speech that would now be subject to Section 10(b) without such protections is difficult to overstate.

Under the Fourth Circuit's decision, for example, issuers of stock can now attack speech they see as false or unflattering using Section 10(b), thus avoiding the higher strictures of actual malice and independent appellate review that govern the law of libel and the non-defamation causes of action in which actual malice is required. While respondent in this case objected to speech that reflected positively on a company's prospects, it too will be able to use the securities laws to sue over critical coverage of companies that would otherwise be entitled to *New York Times* and *Bose* protections. The end-run around the First Amendment would include damage actions by individual investors against publishers if they allege they lost money in the markets because a company executive was misquoted or potential

corporate developments misconstrued. The jurisprudence setting heightened evidentiary protections for speech on matters of public concern that the federal and state courts have carefully built since the constitutional revolution of *New York Times* is at risk.

Under *Bose*, the full record does not support any inferences, let alone with the clear and convincing proof required by *New York Times*, that Stansberry knowingly falsified information to his readers. The record indisputably shows that he believed – and still does – that he accurately reflected his interview with Wingfield, having sent to him the very next day copies of the E-mail, the Report, and the Memorandum that fully disclosed his interpretation of their conversation. By ignoring the evidence of Stansberry's state of mind at the time of publication and the testimony of the two expert witnesses, the district court and the court of appeals made the mistake of presuming material falsity and fraudulent intent based only on a style of writing that offended them and the $1,000 cost of the Report.

Confronted with authority showing that liability under the actual malice requirement is not established on an evidentiary reed as thin as a difference in recollection between a reporter and a source over an interview, the Fourth Circuit conceded that higher proof requirements might well have changed the outcome in this case. App. 20-21a n.14. It found liability under Section 10(b) simply because Stansberry, having interviewed Wingfield, "was in a position to know" whether the statements he published "were true." App. 20a. That standard has

been rejected under the First Amendment because it leaves no room for the "breathing space" for speech freedoms embodied by *New York Times* and *Bose*, where this Court noted the "significant difference between proof of actual malice and mere proof of falsity" and held that an author's "misconception" about "what [he] heard" cannot support an inference, by clear and convincing proof, that he "realized the inaccuracy at the time of publication." *Bose*, 466 U.S. at 511-13; *see also St. Amant*, 390 U.S. at 733 (defendant's "mistake ... does not evidence doubtful mind on his part").

As this case foreshadows, vast amounts of pure speech will be actionable under the securities laws if the future lawsuits the Fourth Circuit has authorized are permitted to turn on the lesser evidentiary standards it has embraced.

b. The permanent injunction warrants this Court's immediate intervention because it violates the *Near* doctrine and will cause irreparable harm

The district court in this case imposed, and the Fourth Circuit expressly approved, a broad injunction that simply repeats the language of Rule 10b-5(a) and (b) in prohibiting petitioners from making "any untrue statement of a material fact" under a securities statute which has been construed to reach pure expression. In a single sentence, the Fourth Circuit dismissively reasoned: "The injunction does not constitute an unlawful prior restraint because it only enjoins [petitioners] from engaging in securities

fraud, which we have held is unprotected speech." App. 50a.

The ruling below disregards nearly 80 years of unbroken jurisprudence, beginning with *Near*, in which this Court has struck down broad prior restraints on the publication of false speech in the future as "the essence of censorship." 283 U.S. at 713. As Chief Justice Burger wrote surveying the *Near* doctrine: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. ... If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The irreparable harm to petitioners from the injunction, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the indications that respondent has every intention of seeking out expression it dislikes in the future, make certiorari appropriate now.

"For many years it has been clearly established that 'any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity.'" *CBS v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers). "[P]ermanent injunctions" such as the final order placing petitioners under the perpetual threat of contempt from government attack on its publications "are classic examples of prior restraints" impermissible under the First Amendment. *Alexander v. United States*, 509 U.S. 544, 550 (1993). As Chief Justice Rehnquist stated in *Alexander*, this

Court's "understanding of what constitutes a prior restraint" comes from cases such as *Near*, where the Court invalidated an order enjoining a defendant who had published newspapers found to constitute "malicious, scandalous, or defamatory" material under a state nuisance law from publishing any such additional publications in the future. The order was unconstitutional, the Chief Justice explained, because instead of punishing *past* speech it "involved a true restraint on *future* speech." 509 U.S. at 550 (emphasis added).

The permanent injunction in this case is a plain violation of *Near*. Petitioners have not been enjoined from republishing a specific statement that a court has already found unprotected. *See Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957). Nor have they been enjoined from continuing an ongoing commercial advertising practice. *See Pittsburgh Press v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 388-90 (1973). Rather, they have been broadly barred across the board from publishing any new statements that a court may one day decide are in violation of Section 10(b) and not a protected form of speech.

As in *Near*, this case involves an injunction issued after a full merits proceeding. As in *Near*, where a previous publication held to violate a statute could not justify a prior restraint on future publications, so is the finding that petitioners published a statement in violation of Section 10(b) in the past constitutionally insufficient to support an injunction against speech yet to come that a court

might hold to violate the statute. This Court has explained why:

> [T]he state [has] made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain."

Vance v. Universal Amusement Co., 445 U.S. 308, 311 n.3 (1980) (holding as an impermissible prior restraint orders enjoining theater-owners who had shown obscene movies from exhibiting films in the future that had not yet been determined to be obscene) (citation omitted). Further revealing the seriousness with which it views broad restrictions on future speech, the Court in *Vance* asserted, "[T]he presumption against prior restraints is heavier . . . than that against limits on expression imposed by criminal penalties." *Id.* at 316 n.13.

In its brief in *Lowe*, respondent, in an effort to save the prior restraint in *that* case, all but conceded why the prior restraint in *this* case is unconstitutional. "[T]he principal objection to prior restraints – that speech will be suppressed before it can be ascertained with relative certainty that it is unprotected by the First Amendment – is wholly inapplicable to the professional licensing context," respondent stated. Brief for Securities and Exchange Comm'n at 46-47, *Lowe*, 472 U.S. 181 (No. 83-1911).

But the "principal objection to prior restraints" – as articulated by the Solicitor General – describes *exactly* the constitutional harm at the heart of this case. *See Pittsburgh Press*, 413 U.S. at 390 ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

Petitioners have no way to "ascertain" whether their future speech will be punished or protected retrospectively. The federal courts have broadly enjoined them from making "any untrue statement" under a statute which, in the interpretation of the federal courts, affords no heightened evidentiary protections for pure speech. The state courts in *Lubin*, on the other hand, on the identical facts, have held that the First Amendment applies to their speech.

Subjecting petitioners, who are not in the securities business, have no fiduciary duties to investors, and do not trade the stocks they write about, to a sweeping federal injunction targeting expression that the state courts have expressly stated triggers First Amendment interests puts them in the impossible position of guessing whether their future speech will be punished or protected and thus forces them to "make only statements which 'steer far wider of the unlawful zone.'" *New York Times*, 376 U.S. at 279 (citation omitted). It is no answer that petitioners can raise First Amendment defenses if and when their future speech is questioned, as the district court contends. App. 109a. The harm of a

prior restraint is the speech it suppresses before any speech is challenged or any contempt proceeding initiated. *See Alexander*, 509 U.S. at 560 (Kennedy, J., dissenting).

That fraud, like defamation or obscenity, is a category of speech that may be penalized does not make injunctions against fraud any more permissible than injunctions against defamation or obscenity. "Frauds," as this Court stated 70 years ago, "may be denounced as offenses and punished *by law*," not by equity. *Schneider*, 308 U.S. at 164 (reversing conviction under ordinance that required canvassers to obtain permits prior to distributing literature) (emphasis added); *see Riley*, 781 U.S. at 803 (Scalia, J., concurring) ("It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable."). Focusing on classes of speech in the prior restraint context as a proxy for whether First Amendment considerations apply is a meaningless and constitutionally-flawed exercise:

> Nor does it help to distinguish situations in which the "speech" involved does not merit first amendment protection from those in which it does merit such protection, the latter alone deserving the benefit of the full-blown presumption against prior restraints. A particular communication cannot authoritatively be called protected or unprotected at a

> point when, by definition, no court has yet determined the constitutional question.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1046-47 (2d ed. 1988).

This Court's precedents show that even in areas of so-called "unprotected" speech where expression can be subject to penalties or other kinds of regulation, broad prior restraints do not survive. *See Telemarketing*, 538 U.S. at 612 (noting that "prophylactic statutes designed to combat fraud by imposing prior restraints" were struck down in *Schaumburg*, *Munson*, and *Riley*); *Vance*, 445 U.S. at 311 (permanent injunction on display of obscene films violates First Amendment); *Near*, 283 U.S. at 713 (permanent injunction on publication of defamatory speech unconstitutional). The presumption against prior restraints is not any less vigorous because the government acts pursuant to an antifraud provision as in this case.

III. At The Very Least, The First Amendment Implications Of The Ruling Below Require Narrowly Reading The "In Connection With" Requirement Of Section 10(b)

In *Lowe*, the only time this Court has construed a securities statute in relation to the speech of a publishing defendant who did not have fiduciary duties or trade stocks, it found that the publisher was not covered, relying on the constitutional avoidance doctrine to reach this result. This Court interpreted language exempting "bona fide" publishers from the

definition of persons covered under the '40 Act as "investment advisers" who must register prior to offering investment advice. In construing the exemption, the Court looked to the history and purpose of the law:

> The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice ... On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Lowe, 472 U.S. at 204.

This Court thus recognized that First Amendment precedent "support[ed] a broad reading of the exclusion." *Id.* at 205. A key consideration was the fact that the '40 Act was passed after the decision in *Near*. As explained in *Lowe*, "In *Near*, the Court emphatically stated that the 'chief purpose' of the press guarantee was 'to prevent previous restraints upon publication.'" *Id.* at 204. The *Lowe* Court made clear that Congress was "undoubtedly aware" of *Near* when it passed the '40 Act, *id.*, and would not have intended the statute to violate recently-articulated constitutional norms. Section 10(b) was also enacted in the wake of *Near*, and respondent is attempting, as it did in *Lowe*, to regulate pure speech in violation of *Near*'s rule against prior restraints.

In this case, petitioners argued that the "in connection with" requirement in Section 10(b) is exactly the sort of loose, ambiguous language that must be confined to avoid constitutional concerns. In *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106 (1948), this Court narrowly read a portion of the Federal Corrupt Practices Act concerning the prohibition of expenditures "in connection with" elections in order to prevent regulation of periodicals published by labor unions. In affirming the dismissal of the indictments, the Court wrote: "[Congress] did not want to pass any legislation that would threaten interferences with the privileges of speech or press. ... The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *Id.* at 120-21.

This Court has thus applied the constitutional avoidance doctrine whether construing a statute to decide what kind of speech activity must be excluded from the law, as in *Lowe*, or what kind cannot be included, as in *CIO*. But the Fourth Circuit ignored *CIO* and misread *Lowe* by creating a meaningless distinction between the "exceptive" language in the '40 Act and the "in connection with" language in Section 10(b). App. 46a. It thus missed the big picture: that this Court construes ambiguity in securities statutes to ensure that they do not violate the First Amendment. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 245 (1996) (referring to the "narrow[]" reading in *Lowe* as necessary "so as not to impose suspect prior restraints") (Scalia, J., dissenting).

Nothing in the legislative record indicates that Congress intended to apply Section 10(b) to statements made by non-fiduciaries who are not themselves otherwise engaged in securities trading. The legislative history shows that lawmakers were concerned about the speech of publishers only to the extent that they were pretending to give "impartial, disinterested discussion of the stock market" when they were actually financially interested because they were trading stocks or receiving payments from issuers and not disclosing either activity. *See* S. Rep. 792, 73d Cong., 2d Sess. 8 (1934). The securities laws clearly cover these practices, and respondent pursues such cases vigorously today – as it would still be able to do after a reversal of the Fourth Circuit.[3]

The need for this Court's intervention today is even greater than it was in *Lowe*, as Section 10(b), unlike the '40 Act, is not limited to the provision of investment advice. It covers all factual statements about securities and public companies, a much broader category of speech than stock recommendations, and it permits private lawsuits, which the '40 Act does not. With this case, respondent seeks to undo *Lowe* by using a different

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[3] The Fourth Circuit again misreads *Lowe* to suggest that this Court held that publishers exempt from the '40 Act remained for all purposes "subject to the coverage of § 10(b)." App. 46a. The cited footnote from *Lowe* addresses cases involving newspaper and newsletter writers who traded the stocks they recommended by "scalping" or "front running" – purchasing a security prior to publication and selling later at a profit – a course of conduct in which the defendants' own trading coincided with their speech and thus triggered the statute.

and more dangerous regulatory instrument and to regain the editorial control over disinterested investment and financial writing that this Court properly took away from it 25 years ago.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, *Plaintiff-Appellee,* v. PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY, *Defendants-Appellants,* and AGORA, INCORPORATED, Defendant, JAMES DALE DAVIDSON, Intervenor/Defendant.	No. 08-1037

FORBES, LLC; HEARST CORPORATION; TRIBUNE COMPANY (including the Baltimore Sun); EAGLE FINANCIAL, INCORPORATED; INVESTORPLACE MEDIA, LLC; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CALIFORNIA FIRST AMENDMENT COALITION; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amici Supporting Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, Senior District Judge. (1:03-cv-01042-MJG)

Argued: December 2, 2008

Decided: September 15, 2009

Before WILLIAMS, Chief Judge,* and NIEMEYER and MOTZ, Circuit Judges.

Affirmed by published per curiam opinion.

ARGUED: Bruce D. Brown, BAKER & HOSTETLER, L.L.P., Washington, D.C., for Appellants. Michael Conley, UNITED STATES SECURITIES & EXCHANGE COMMISSION, Washington, D.C., for Appellee. ON BRIEF: Bruce W. Sanford, Lee T. Ellis, Jr., Laurie A. Babinski, BAKER & HOSTETLER, L.L.P., Washington, D.C.; Matthew J. Turner, Baltimore, Maryland, for Appellants. Brian G. Cartwright, General Counsel, Andrew N. Vollmer, Deputy General Counsel, Jacob H. Stillman, Solicitor, Mark Pennington, Assistant General Counsel, Rada L. Potts, Senior Litigation Counsel, SECURITIES & EXCHANGE COMMISSION, Washington, D.C., for Appellee. Walter Dellinger, Mark S. Davies, Allison Orr Larsen, O'MELVENY & MYERS, L.L.P., Washington, D.C.; Kai Falkenberg, Editorial Counsel, FORBES, L.L.C., New York, New York; Eve Burton, Jonathan Donnellan, THE HEARST CORPORATION, New York, New York;

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* Chief Judge Williams heard oral argument in this case but did not participate in the decision. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

David S. Bralow, Assistant General Counsel, TRIBUNE COMPANY, East Coast Publishing, New York, New York; Lucy A. Dalglish, Gregg P. Leslie, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Arlington, Virginia; Kevin M. Goldberg, AMERICAN SOCIETY OF NEWSPAPER EDITORS, Arlington, Virginia; Kathleen A. Kirby, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, Washington, D.C.; Robert M. O'Neil, Josh Wheeler, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, Charlottesville, Virginia, for Amici Supporting Appellants.

OPINION PER CURIAM:

Frank Porter Stansberry and Pirate Investor LLC (collectively, "Appellants") offered and sold an e-mail stock tip. The offer and the tip contained representations that information in both documents was the product of conversations with a senior executive inside the company that was the focus of the tip. After conducting a bench trial, the district court concluded that the representations concerning the source of information in the e-mail stock tip were false, and it determined that Appellants had violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b) (West 2009), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2008), by offering and selling the stock tip. The district court ordered disgorgement of Appellants' profits from the sales of the stock tip, imposed civil penalties, and issued an injunction against future

violations of Section 10(b) and Rule 10b-5.[1] Appellants argue that the facts of this case do not support the district court's finding of liability, and that the injunction against future violations of § 10(b) is overbroad. For the following reasons, we affirm.

I.

Pirate Investor LLC is a Maryland limited liability company that publishes investment newsletters.[2] Pirate also provides an e-mail service to its subscribers called the "Blast." Pirate is wholly owned by Agora, Inc., a Maryland corporation that publishes books, magazines, and newsletters covering a wide range of topics.[3] Stansberry is the editor-in-chief of Pirate, and in this capacity he writes and publishes investment newsletters.

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[1] "The scope of Rule 10b-5 is coextensive with the coverage of § 10(b)." *SEC v. Zandford*, 535 U.S. 813, 816 n. 1 (2002). Accordingly, we will use "§ 10(b)" to refer to both the statute and the rule. *See SEC v. Wolfson*, 539 F.3d 1249, 1256 n.11 (10th Cir. 2008).

[2] We view the facts in the light most favorable to the prevailing party below, in this case the SEC. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 590 (2001); *Taylor v. First Union Corp.*, 857 F.2d 240, 245 (4th Cir. 1988).

[3] Along with Stansberry and Pirate, Agora was an original defendant in the SEC's action. The district court rejected the SEC's theory that Agora, as the parent company of Pirate, was also liable for any wrongdoing committed by Stansberry and Pirate, and the SEC has not appealed that ruling.

Sometime in April 2002, Stansberry became aware of a company called USEC, Inc. USEC is a provider of uranium-enrichment services that began as an arm of the United States government.[4] The company currently is the executive agent of the United States government under a disarmament pact that was signed between the United States and Russia in 1993. Under the pact, known as "Megatons to Megawatts," Russia sells uranium that was formerly used in Soviet nuclear warheads to the United States for use as fuel in nuclear power plants. The pact further requires USEC and OAO Techsnabexport ("Tenex"), its Russian counterpart, to periodically renegotiate the price of the uranium. Any new pricing agreement is subject to approval by both the United States and Russian governments. The pricing agreement between USEC and Tenex expired at the end of 2001, and the two companies negotiated a new agreement in February of 2002. Neither the Russian nor the United States governments had approved this new agreement as of May 2002, however, and USEC requested that the United States government place the pricing agreement on the agenda for a summit between President George W. Bush and Russian President Vladimir Putin that was planned for that month.

After becoming aware of the circumstances surrounding USEC's pricing agreement, Stansberry contacted Steven Wingfield, USEC's Director of Investor Relations, and on May 2, 2002, conducted a

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[4] USEC was privatized in July of 1998.

telephone interview with Wingfield. This case revolves around two communications — a special report on USEC ("USEC Special Report") and a solicitation hawking that report ("Super Insider Tip E-mail") — that Stansberry prepared following that telephone conversation.

The Super Insider Tip E-mail was a promotional document calling on investors to "DOUBLE YOUR MONEY ON MAY 22ND WITH THIS 'SUPER INSIDER' TIP." (J.A. at 2972.) Specifically, the document purported to contain information obtained from "a senior company executive" that would allow investors to know exactly when "a major international agreement between the United States and Russia" would be concluded, resulting in substantial profits for a particular U.S. company. (J.A. at 2972.) The document identified May 22 as the day the deal would close and inveigled investors with assurances that "[t]his is the kind of insider information that could make you a lot of money." (J.A. at 2972-73.)

The Super Insider Tip E-mail also included some back-ground on the company, as well as details of how the upcoming deal would benefit the company.[5]

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[5] The e-mail also contained several flippant remarks. The e-mail's commentary on the nature of politics is particularly noteworthy:

> See how this works? It's a total insider deal. Money and favors in exchange for a fat deal with the Russians. Hey, I know it's dirty. But I don't make the rules and I don't run the company or

The document did not provide the name of the company. For that nugget of information, investors were told that they would have to pay $1,000. Stansberry signed the e-mail under the pseudonym "Jay McDaniel."[6]

Those who responded to the Super Insider Tip E-mail and paid $1,000 would receive the USEC Special Report. This communication identified USEC as the company referenced in the Super Insider Tip E-mail. The USEC Special Report engaged in a financial analysis of USEC's fundamentals and discussed its

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> involve myself in politics. On the other hand, I see nothing wrong with profiting from my insider knowledge of this deal and I don't think you should be ashamed to do so either.
>
> And guess what? The deal with the Russians has ALREADY BEEN SIGNED. That's right. It's all done, locked up. Finished. The only thing that both sides are waiting on is the proper media event to announce this commercial cooperation between the Ruskies and us. It's a feel good thing. It's PR for the politicians. You know how the game works.

(J.A. at 2974-75.) Despite the tip's suggestion that the author was also profiting from the information, "[a]t no time relevant to this case did Stansberry, Pirate Investor, or Agora own or trade in the stock of USEC." (J.A. at 124.)

[6] In fact, "Jay McDaniel" was the pen name of Raymond Madron, an independent contractor for Pirate who wrote a weekly promotional piece advertising Agora products or services.

role as the United States' agent under the 1993 disarmament pact. It observed that USEC had reached an agreement with its Russian partner regarding a market-based pricing agreement for nuclear fuel, but cautioned that "implementation of the agreement is subject to review and approval by the U.S. and Russian governments." (J.A. at 3111.) The USEC Special Report then repeated the claim made in the Super Insider Tip E-mail that: "A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22nd.'" (J.A. at 3111.)

On May 13, 2002, Stansberry sent the Super Insider Tip E-mail to the Pirate Investor Blast Database, a list of e-mail addresses of subscribers to Pirate products. After an initial favorable response,[7] Stansberry caused the Super Insider Tip E-mail to be sent to numerous other electronic databases associated with Agora products, as well as at least one database that had no affiliation with Agora. Ultimately, over 800,000 individuals received the Super Insider Tip E-mail. Investors purchased 1,217 copies of the USEC Special Report, resulting in net proceeds of $1,005,000. Pirate received $626,500 of that sum.

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[7] One hundred seven USEC Special Reports were sold in the initial 24 hours after submission of the Super Insider Tip E-mail to the Pirate Investor Blast database.

Of course, what investors did not know, and what became the focus of the SEC's case against Stansberry and Pirate, was that Wingfield had never told Stansberry that approval of the USEC-Tenex pricing agreement would be announced on May 22.[8] Indeed, nothing was announced on May 22, and the pricing agreement was ultimately announced on June 19, 2002. On April 18, 2003, the United States Securities and Exchange Commission ("SEC") filed a civil complaint charging Agora, Pirate, and Stansberry with securities fraud under § 10(b) of the Securities Exchange Act of 1934. Following a bench trial, the district court concluded that Appellants violated § 10(b) by falsely claiming that a company insider provided the information in the Super Insider Tip E-mail and the USEC Special Report. Appellants were held jointly and severally liable for disgorgement of the profits of the scheme, plus prejudgment interest. Civil penalties were also imposed on Appellants, and the district court entered a permanent injunction enjoining them from further violations of § 10(b).[9] Appellants timely appealed, raising three issues: (1) whether the conduct in this case constituted a violation of § 10(b); (2) whether, if

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[8] In the proceedings before the district court, Stansberry adhered to his claim that Wingfield did, in fact, suggest that approval of the pricing agreement would be announced on May 22. The district court found, however, that Wingfield made no such statements. Stansberry and Pirate do not challenge this particular factual finding on appeal.

[9] By order dated February 28, 2008, a panel of this court stayed the injunction pending appeal.

the conduct here does fall within the purview of § 10(b), the First Amendment entitles Appellants to the heightened protections it affords the media in other contexts; and (3) whether the permanent injunction entered by the district court is an improper prior restraint on speech.

II.

We begin with Appellants' claim that their conduct did not constitute a violation of § 10(b). In a civil enforcement action under § 10(b), the SEC must establish that the defendant "(1) made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities."[10] *McConville v. SEC,* 465 F.3d 780, 786 (7th Cir. 2006). The SEC bears the burden of establishing each element by a preponderance of the evidence. *Herman & MacLean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (preponderance of the evidence standard applies to § 10(b) actions). We address each element in turn.

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[10] Unlike private litigants, the SEC need not prove the additional elements of reliance or loss causation. *See SEC v. Rana Research, Inc.,* 8 F.3d 1358, 1364 (9th Cir. 1993) ("The SEC need not prove reliance in its action for injunctive relief on the basis of violations of section 10(b) and Rule 10b-5."); *SEC v. Blavin,* 760 F.2d 706, 711 (6th Cir. 1985) ("Unlike private litigants seeking damages, the Commission is not required to prove that any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money.").

A.

Section 10(b) requires that a defendant act deceptively in order to fall within the coverage of the statute. *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 473 (1977) ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception."). Deceptive acts include misstatements, omissions by those with a duty to disclose, manipulative trading practices, and deceptive courses of conduct. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S. Ct. 761, 769 (2008). The facts of this case easily satisfy this element. The district court found that Wingfield never told Stansberry that approval of the pricing agreement would be announced on May 22, and the Appellants do not challenge that finding on appeal. Thus, Appellants' representations that they based their predictions on information obtained from a source within USEC were misstatements of fact.[11]

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[11] On this point, we believe that the concerns raised by the *amici* are entirely illusory. The *amici* suggest that the district court premised its finding of liability on Appellants' claim that USEC's stock price would rise on a particular day — May 22 — and that such a prediction about a stock price change "is not an 'actual fact' but an 'opinion' that can never be a 'false' statement for purposes of the securities laws." (Amici Br. at 20.) This argument ignores the plain language of the district court's opinion, which clearly shows that the district court based its liability determination, not on the prediction itself, but on Appellants' claims that the prediction was the result of a conversation with a company insider:

B.

It is not enough, however, for the SEC to point to a false statement — the misrepresentation must concern a material fact. *See Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) ("It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant."); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004) ("The plain language of Rule 10b-5 . . . requires any successful securities-fraud suit to allege a fact that is both untrue *and* material."). We have adopted the following standard for addressing materiality:

> [A] fact stated or omitted is material if there is a substantial likelihood that a reasonable purchaser or seller of a

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> The Court finds that the SEC has established that the Super Insider Solicitation and the Special Report include actionable false statements — to the effect that the author was basing his statement as to a May 22, 2002 rise in stock price upon statements made to him by a senior executive of USEC in a position to know when the price agreement would be approved.

(J.A. at 158.) Claims regarding the source of information are not expressions of subjective opinion, but are representations of an objectively verifiable fact. *Cf. Miller v. Asensio & Co.*, 364 F.3d 223, 228 n.3 (4th Cir. 2004) ("The statements cannot be dismissed as unverifiable opinion; they set forth or were grounded in actual past or present facts, which Plaintiffs demonstrated to be false." (internal citation marks omitted)).

> security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.

Longman v. Food Lion, Inc., 197 F.3d 675, 683 (4th Cir. 1999). Determining whether the facts of a particular case meet this standard "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Accordingly, we review for clear error the district court's determination, made after a bench trial, that Appellants' misrepresentations were material. *See Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 888 (9th Cir. 2008) (reviewing district court's findings on materiality for clear error); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 754 (11th Cir. 2007) (same); *Lawton v. Nyman*, 327 F.3d 30, 42 (1st Cir. 2003) (same); *SEC v. Maio*, 51 F.3d 623, 637 (7th Cir. 1995) (same).

Applying that standard, we see no clear error in the district court's finding of materiality. Appellants promised investors that the information they were receiving was the product of a conversation with a company insider. The materiality determination thus turns on whether the reasonable investor would treat a particular stock recommendation differently depending on whether or not the recommender was

acting on inside information. We fail to see any clear error in the district court's determination that an investor *would* consider this question important in deciding whether to purchase the recommended security.[12] *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090-91 (1991) (noting that statements by directors raise "no serious question" of materiality because directors "usually have knowledge and expertness far exceeding the normal investor's resources"). Moreover, purchasers of the USEC Special Report testified that it was important to them that the information conveyed in the report came

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[12] Appellants' arguments on appeal fail to address this point. Rather, they attempt to find error in the district court's consideration of stock price evidence to support its materiality finding, because there was an abundance of positive information about USEC on the market during the time period that Appellants circulated the solicitation e-mail and special report. According to Appellants, it was the positive media attention that USEC was receiving that led to an increase in USEC's share price, not securities purchases by purchasers of the USEC Special Report. Thus, the argument goes, the district court should not have relied on this stock price evidence to conclude that the misrepresentations were material.

This argument misconstrues the district court's opinion. The district court's materiality finding was not premised on market data; the district court only looked to the market data surrounding USEC as an additional way of confirming that the statements were material. Even if the district court should not have attributed the increase in trading volume and share price of USEC stock after May 14 to Appellants' communications, given the self-evident materiality of a claim that one possesses inside information, the district court's ultimate conclusion still would not amount to clear error.

from a source inside USEC, and that this characteristic influenced them to purchase the report and, subsequently, USEC stock. *See Harris v. Union Elec. Co.*, 787 F.2d 355, 366-67 (5th Cir. 1986) (finding no error in jury determination of materiality where the jury heard testimony from various purchasers and market experts); *Alton Box Board Co. v. Goldman, Sachs & Co.*, 560 F.2d 916, 922 (8th Cir. 1977) (noting the relevance of "testimony from sophisticated institutional purchasers that [omitted] facts would have been important to them"). In short, we find no clear error in the district court's conclusion that the misstatements in this case concerned material facts.

C.

Next, we consider whether Appellants acted with the requisite intent, or scienter. "[T]he term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). The SEC meets its burden of proving scienter by establishing that the speaker acted intentionally or recklessly; the negligent speaker, however, avoids liability. *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338, 343-44 (4th Cir. 2003). Here, the district court determined that the SEC met its bur-den of proving that Stansberry acted with the requisite intent, and the court imputed Stansberry's scienter to Pirate.[13]

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[13] Specifically, the court held that "Stansberry's scienter is imputed to Pirate because he effectively controlled Pirate and

i.

In challenging the district court's scienter determination, Appellants contend that the First Amendment protections recognized by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), apply to this case. They claim that the SEC needed to prove by clear and convincing evidence that they acted with "actual malice." To support this claim, they direct us to *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), a case involving the application of the *New York Times* standard to a product disparagement action.

In *Bose*, the Supreme Court was concerned with determining the proper standard of review for courts of appeals to apply when confronted with a district court finding that a particular statement was made with the "actual malice" required by *New York Times*. After determining that the Constitution requires independent appellate review of "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection," *id.* at 510-11, the *Bose* Court moved on to a review of the facts of that case and noted that "the only evidence of actual malice on which the District

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made the statements at issue on behalf of Pirate as an agent of Pirate, within the scope of his agency." (J.A. at 170.) Pirate and Stansberry do not challenge this aspect of the district court's decision.

Court relied was the fact that the statement was an inaccurate description of what [the defendant] had actually perceived," *id.* at 512. The *Bose* Court then held that the defendant's statement fell within the protections afforded by the First Amendment. *Id.* at 513.

Relying on the *Bose* Court's statement that "there is a significant difference between proof of actual malice and mere proof of falsity," *id.* at 511, Appellants argue that we cannot uphold the district court's resolution of the scienter issue because the district court "confused proof of falsity with proof of fault." (Appellants' Br. at 48.) They claim that there is no evidence in the record to support the district court's finding of scienter, absent the falsity of the claim that an insider provided the information on which they based the tip, and implore us to follow *Bose*'s lead by holding that an absence of additional evidence of intent necessarily means that the clear and convincing evidence standard mandated by *New York Times* has not been satisfied.

As we discuss elsewhere in this opinion, *see infra* Part III, we do not believe that the *New York Times* standard is applicable to this case. Thus, we reject Appellants' argument insofar as it relies on the mistaken belief that the SEC needed to prove intent by clear and convincing evidence, rather than under the preponderance of the evidence standard typically applicable to civil enforcement actions under § 10(b). Similarly, we reject the notion that independent appellate review of the district court's scienter determination is necessary under *Bose* and instead

review the district court's finding that Appellants acted with scienter for clear error. *See Merchant Capital,* 483 F.3d at 766 (questions of scienter are reviewable under the clearly erroneous rule); *see also Healey v. Chelsea Res., Ltd.,* 947 F.2d 611, 618 (2d Cir. 1991) ("Matters of misrepresentation, knowledge, reliance, causation, and scienter are questions of fact, and the trial court's findings as to those facts may not be set aside unless they are clearly erroneous.").

ii.

After reviewing the record, we are convinced that the district court's conclusion that Appellants acted with scienter was not clearly erroneous. The district court rested its conclusion on the circumstances surrounding the phone call between Stansberry and Wingfield. Having concluded that Wingfield did not, in fact, disclose to Stansberry that approval of the pricing agreement would be announced on May 22, the district court simply inferred that Stansberry, having been a party to that conversation, must have known that his claim that he had heard from a senior USEC executive that the announcement would occur on May 22 was false. The district court surmised that Stansberry "could not possibly have had a belief that the information he provided in the Super Insider Solicitation and Special Report was correct in all material respects" because he "knew full well that Wingfield had not told him that the pricing agreement would be announced on May 22." (J.A. at 170.)

We see nothing clearly erroneous about this conclusion. The district court did not premise its finding on the falsity of the statements, but on the fact that Stansberry was in a position to know whether or not his statements were true. As other courts have recognized, the fact that a defendant publishes statements when in possession of facts suggesting that the statements are false is "classic evidence of scienter." *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002); *see also Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 665 (8th Cir. 2001) ("One of the classic fact patterns giving rise to a strong inference of scienter is that defendants published statements when they knew facts or had access to information suggesting that their public statements were materially inaccurate."). Stansberry, having conducted the interview with Wingfield, would have known whether or not Wingfield told him to "watch the stock on May 22nd." Once the district court found that Wingfield never made such a statement, there is nothing controversial in drawing the logical conclusion — that Stansberry would know that his claim was false.[14]

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[14] Appellants' only rejoinder to this point is to beat a retreat to more First Amendment case law by directing us to defamation cases where courts have been unwilling to find actual malice because the finding would depend on the resolution of a dispute between a source and a writer about what was said in a conversation. We do not find these cases relevant, however, as they appear to rest their holdings on the higher burden of proof applicable to defamation actions. The court in *Long v. Arcell*, 618 F.2d 1145 (5th Cir. 1980), for

In addition, it would take an act of willful blindness to ignore the fact that Appellants profited from the false statements. Appellants surely knew that absent claims of insider knowledge, it is highly unlikely that investors would pay $1,000 for a stock recommendation. This inference is borne out by the emphasis that the solicitation e-mail placed on the "inside" nature of the tip as it encouraged investors to purchase the USEC Special Report. Given such a clear financial motive for the misrepresentations, the district court's conclusion that they were made with scienter is hardly surprising. The clear error standard of review demands something much more egregious than what confronts us here. *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) ("To be clearly erroneous, a decision must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.").

D.

Finally, we turn to § 10(b)'s fourth requirement, the "in connection with" requirement. Appellants claim that the fraud in this case did not make the necessary connection to securities transactions because Appellants did not trade in USEC stock or breach any fiduciary duties. We disagree, and for the reasons discussed below we find no error in the district court's determination that Appellants

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example, admitted that "[i]f the applicable burden of proof had been a preponderance of the evidence, a jury verdict either way would have to stand." *Id.* at 1148.

committed fraud "in connection with" the purchase or sale of securities.

"The Supreme Court has consistently embraced an expansive reading of § 10(b)'s 'in connection with' requirement." *SEC v. Wolfson,* 539 F.3d 1249, 1262 (10th Cir. 2008); *see also SEC v. Zandford,* 535 U.S. 813, 819 (2002) ("In its role enforcing the Act, the SEC has consistently adopted a broad reading of the phrase 'in connection with the purchase or sale of any security.'"). We construe the statute "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Zandford,* 535 U.S. at 819 (internal quotation marks omitted). Under Supreme Court case law, fraudulent activity meets the "in connection with" requirement of § 10(b) whenever it "touches" or "coincides" with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, 85 (2006) ("Under our precedents, it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else."); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.,* 404 U.S. 6, 12-13 (1971) (holding "in connection with" requirement satisfied where injury occurred "as a result of deceptive practices touching [a] sale of securities").

Of course, to say that a fraud is "in connection with" a securities transaction whenever it "coincides" with that transaction hardly clarifies the matter. We find direction in several factors that other courts have considered relevant when determining whether the "in connection with" requirement has been satisfied in a particular case. These factors include,

but are not limited to: (1) whether a securities sale was necessary to the completion of the fraudulent scheme, *Zandford,* 535 U.S. at 820-21; (2) whether the parties' relationship was such that it would necessarily involve trading in securities, *Rowinski v. Salomon Smith Barney Inc.,* 398 F.3d 294, 302-03 (3d Cir. 2005); (3) whether the defendant intended to induce a securities transaction, *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.,* 210 F.3d 1207, 1221 (10th Cir. 2000), *aff'd,* 532 U.S. 588 (2001); and (4) whether material misrepresentations were "disseminated to the public in a medium upon which a reasonable investor would rely," *Semerenko v. Cendant Corp.,* 223 F.3d 165, 176 (3d Cir. 2000). Importantly, these factors are not mandatory requirements that a fraud must satisfy in order to meet § 10(b)'s "in connection with" requirement. They exist merely to guide the inquiry, and we do not presume to exclude other factors that could help distinguish between fraud in the securities industry and common law fraud that happens to involve securities. *See Zandford,* 535 U.S. at 820; *see also Stoneridge Inv. Partners,* 128 S. Ct. at 771 ("Though § 10(b) is not limited to preserving the integrity of the securities markets, it does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way." (internal citations and quotation marks omitted)). Moreover, a fraud need not satisfy all of the factors to be "in connection with" a securities transaction; a close fit with one factor may well be enough for a fraud to result in § 10(b) liability. The application of the factors should be rooted in the understanding that the "in connection with" requirement is a flexible one

and that questions concerning its scope are best examined on a case-by-case basis. *See Semerenko,* 223 F.3d at 175 (noting that "the scope of the 'in connection with' requirement must be determined on a case-by-case basis"); *Chem. Bank v. Arthur Andersen & Co.,* 726 F.2d 930, 942 (2d Cir. 1984) ("In cases near the borderline, courts have warned that '[i]t is important that the standard be fleshed out by a cautious case-by-case approach.'" (quoting *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 595 (5th Cir. 1974))).

i.

We first consider whether a securities transaction was necessary to the completion of the fraudulent scheme. In *Zandford,* for example, the Supreme Court noted that the stock sales in that case were a fundamental component of the defendant's fraudulent scheme:

> [E]ach sale was made to further respondent's fraudulent scheme; each was deceptive because it was neither authorized by, nor disclosed to, the Woods. With regard to the sales of shares in the Woods' mutual fund, respondent initiated these transactions by writing a check to himself from that account, knowing that redeeming the check would require the sale of securities.

Zandford, 535 U.S. at 820-21. *See also Alley v. Miramon,* 614 F.2d 1372, 1378 n.11 (5th Cir. 1980)

("[T]he 'in connection with' test . . . is satisfied when the proscribed conduct and the sale are part of the same fraudulent scheme."); *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 472 (D.N.J. 2005) ("[T]he only way for this scheme to succeed was for investors to purchase securities (shares of the defendant mutual funds).").

Appellants argue that the fraud in this case was complete when investors purchased the USEC Special Report because the $1,000 purchase price was the only material benefit that Appellants received. Under this theory of the case, Appellants derived no benefit from the purchasers' securities trading. They claim:

> [T]he alleged fraud was consummated and concluded when the Report was sold and the reader paid $1000. If there was a fraudulent scheme, no subsequent securities transactions were necessary to it, as neither the Publisher nor the Author derived any benefit from such trading. Indeed, the defendants would have committed fraud if not a single purchaser of the Report bought USEC shares, or if the Report named a fictitious company with a fictitious ticker symbol, because they still would have 'defrauded' readers of the cost of the publication.

(Reply Br. at 9.) We believe that this is a rather short-sighted view of the fraudulent scheme and, taking the facts in the light most favorable to the

SEC, we conclude that Appellants did benefit from securities trading by purchasers of the USEC Special Report.

First, Appellants' characterization of the fraud fails to recognize that Appellants used stock purchases by early purchasers of the USEC Special Report as a way of enhancing the credibility of the report. Over 800,000 investors received the Super Insider Tip E-mail that offered the USEC Special Report for sale, but they did not receive the solicitation at the same time. Rather, Appellants sent out the solicitation in waves to various groups of investors. And, later versions of the solicitation pointed to a rise in USEC's stock price — which the district court determined was the result of purchases by early recipients of the solicitation and special report — as supporting the trustworthiness of the tip.

When Stansberry first circulated the solicitation to the Pirate Investor Blast Database, on May 13, the solicitation noted that the stock was "only a $7.00 stock." (J.A. at 2979.) On May 17, however, Stansberry edited the solicitation e-mail to reflect a change in the stock's price. Future versions of the e-mail reflected the stock's updated price of $9.00 a share. Moreover, and most importantly, future versions of the solicitation e-mail used this jump in price as a selling point. The e-mail pointed out that the stock in question "has jumped this week and looks poised to go much higher," and quickly followed with an offer to sell the identity of the company for $1,000. (J.A. at 3034.) Thus, the rising stock was important to the success of the scheme because it

served to motivate later purchasers to part with their requisite $1,000 payment. The fraud was not complete when investors paid $1,000 to learn the identity of the company in question; Appellants also needed those investors to purchase the stock thereby increasing the stock price so as to boost the credibility of the solicitation e-mail to obtain more $1,000 payments.

These facts are similar to those that the Third Circuit faced in *Rowinski.* In that case, Salomon Smith Barney, a stock brokerage and investment firm, allegedly provided "research [that] was unlawfully biased in favor of the firm's investment banking clients, to the detriment of its retail brokerage customers." *Rowinski,* 398 F.3d at 296. Specifically, the plaintiffs alleged that Salomon Smith Barney systematically misrepresented the value of securities to investors who used the firm's retail brokerage services in order to "curry favor with investment banking clients and reap hundreds of millions of dollars in investment banking fees." *Id.* at 296-97. Seeking to avoid the provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which provides for the removal and federal preemption of certain state court class actions alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C.A. § 78bb(f)(1)(A) (West 2009), the plaintiffs argued that the fraud in

that case did not occur "in connection with the purchase or sale of a covered security."[15]

Much like Appellants' argument that the conduct in this case sounds in common law fraud, the plaintiffs in *Rowinski* argued that their complaint stated a "straightforward breach of contract claim, *i.e.,* Salomon Smith Barney agreed to provide unbiased investment research and failed to provide it." *Rowinski,* 398 F.3d at 300. The Third Circuit disagreed, observing:

> For this purported scheme to work, investors must purchase the misrepresented securities. Absent purchases by "duped" investors and a corresponding inflation in the share price, Salomon Smith Barney's biased analysis would fail to benefit its banking clients and, in turn, would fail to yield hundreds of mil-lions of dollars in investment banking fees. The scheme, in

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[15] While in *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005), the Third Circuit was considering the "in connection with" requirement in the context of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), its interpretation was tied to existing doctrine under § 10(b). *Rowinski,* 398 F.3d at 299; *see also Instituto de Prevision Militar v. Merrill Lynch,* 546 F.3d 1340, 1348 (11th Cir. 2008) ("'[I]n connection with the purchase or sale' of a security under SLUSA covers the same range of activities that the SEC could prosecute as violations of § 10(b) and Rule 10b-5."); *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122, 1127 (8th Cir. 2008) (same).

> other words, necessarily "coincides" with the purchase or sale of securities.

Rowinski, 398 F.3d at 302. In other words, the alleged fraud was not confined to the firm's representations to individual investors — the court realized that the stock purchases of investors who acted on that advice would lead to third parties, the companies, providing a benefit to the firm. Likewise, in this case Appellants used the inflation in the stock price caused by investors who purchased USEC stock in reliance on early versions of the USEC Special Report to influence third parties — investors who received the updated versions of the solicitation — to purchase copies of the USEC Special Report. Thus, securities transactions helped Appellants to maximize the profitability of their scheme.

In addition, the record shows that Appellants were not only relying on the rise in USEC's stock price to boost the credibility of this particular stock recommendation. They expected that the rise in USEC's price would lead to a general increase in Appellants' reputation as trusted purveyors of internet investment advice. The fraud's ultimate success involved not only the $1,000 purchase price, but also the boost in reputation that would accrue with those who purchased stock in reliance on the report — a reputational gain that would lead to future purchases of future reports on different companies. As Stansberry noted in an e-mail, "[i]f we're able to sell this to 250 people *and it works*, we'll be able to charge almost whatever we want next time." (J.A. at 3143) (emphasis added). In effect,

Appellants' own definition of success depended on people purchasing securities in reliance on the report.

ii.

The next factor that we consider — whether the parties' relationship was such that it would necessarily involve trading in securities — weighs in favor of Appellants. Appellants sold investment advice; ultimately, the decision to purchase securities rested squarely with those who received the solicitation and USEC Special Report. In this respect, Appellants differ from the defendant in *Zandford.* In that case the defendant, a broker, possessed a general power of attorney — granted by his victims — allowing him to engage in securities transactions on their behalf. 535 U.S. at 815. The very purpose of the broker/investor relationship is trading in securities. *Rowinski,* 398 F.3d at 303. No such relationship existed in this case.

Indeed, we believe that the lack of a trading relationship serves to distinguish this case from one of the cases relied on by the SEC and the district court, *SEC v. Terry's Tips, Inc.,* 409 F. Supp. 2d 526 (D. Vt. 2006). Like Appellants, the defendant in *Terry's Tips* was an online financial advisor who made trading recommendations. *Id.* at 529. Significantly, however, the SEC's case against the defendant in *Terry's Tips* revolved around misrepresentations relating to the defendant's provision of auto-trading services. In an auto-trading arrangement, subscribers authorize an online financial adviser to direct trades on their behalf — the customers often are not aware of the trades until

after they have already occurred.[16] In such a scenario, the adviser is no longer merely a purveyor of information to investors who can choose to invest or not invest. Rather, in such a relationship investors explicitly delegate their decision-making authority to the online investment advisor; the parties'

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[16] As explained by the court in that case:

> Auto-trading is an investment vehicle in which subscribers to online investment newsletters open auto-trading accounts with brokerage firms, and authorize the online adviser to direct the trades in the subscribers' accounts. Auto-trading services are typically offered as an additional service provided by online financial newsletters. The financial newsletters usually require subscribers to pay a fee to auto-trade in addition to the subscription fee paid to receive the general newsletter. The online adviser has arrangements with one or more broker-dealers that accept the adviser's auto-trading customers. The auto-trading customer sets up a brokerage account with a broker-dealer and executes a power of attorney or trading authorization authorizing the broker-dealer to automatically execute trades in the customer's account on instructions from the online adviser. Once the broker-age account is established, the online adviser sends specific trading instructions by e-mail or facsimile to the broker-dealer. These instructions are timed to take advantage of market events, and the customer usually learns of the trades only after they have been executed by the broker-dealer.

SEC v. Terry's Tips, Inc., 409 F. Supp. 2d 526, 529-30 (D. Vt. 2006).

relationship becomes one that would necessarily contemplate trading in securities. The parties in this case contemplated no such arrangement.

iii.

The third factor we consider is whether Appellants made their misrepresentations with the intent to induce a securities transaction. *Compare United Int'l Holdings, Inc.*, 210 F.3d at 1221 (representations made with the purpose of inducing the purchase of an option are made "in connection with" the purchase or sale of a security), *and SEC v. Jakubowski*, 150 F.3d 675, 679 (7th Cir. 1998) (statements made directly to the issuer in order to induce the issuer to accept an offer to purchase satisfy the "in connection with" requirement), *with Ketchum v. Green*, 557 F.2d 1022, 1028 (3d Cir. 1977) ("in connection with" requirement unsatisfied where the purpose of the deception was not to cause a securities transaction). *See also Zandford*, 535 U.S. at 823-24 (noting defendant's secret intent to keep the proceeds from sales of his client's stock); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993) (noting that defendant "intended to affect the market for [the] stock"). On this point we find no error in the district court's conclusion that "[t]he very essence of the fraudulent scheme was to induce its victims to purchase USEC stock prior to May 22, 2002 . . . ." (J.A. at 174.) We have already discussed how securities purchases by recipients of the misrepresentations would inure to the benefit of Appellants, and we believe that the text of the USEC Special Report itself forecloses any argument that

Appellants did not intend for investors to purchase securities in reliance on the false statements.

The USEC Special Report, which, it bears repeating, Appellants sent to investors *after* those investors had parted with their $1,000, *repeated* the false claim that "[a] USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said '*watch the stock on May 22nd.*" (J.A. at 3111.) The report also called upon investors to "call your broker now and tell him to buy shares of USEC." (J.A. at 3109.) This raises the question: If, as Appellants claim, the misrepresentations were only intended to induce investors to purchase the USEC Special Report, why were they repeated in the report itself, which directly called investors to action? The record evidence compels the conclusion that Appellants intended the recipients of the solicitation and the USEC Special Report to trade in securities.

iv.

Finally, we turn to the factor that the district court primarily relied on in making its determination that the fraud satisfied the "in connection with" requirement — whether Appellants utilized a device "that would cause reasonable investors to rely thereon" and "so relying, cause them to purchase or sell a corporation's securities." *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156 (2d Cir. 1998) (internal quotations omitted). This standard is derived from a Second Circuit opinion, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc). In *Texas Gulf*, the Second Circuit held that

"Rule 10b-5 is violated whenever assertions are made . . . in a manner reasonably calculated to influence the investing public . . . ." *Id.* at 862. Subsequent decisions have refined *Texas Gulf,* and several circuits now agree that:

> Where the fraud alleged involves public dissemination in a document such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely, the "in connection with" requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission.

Rana Research, Inc., 8 F.3d at 1362; *see also Wolfson,* 539 F.3d at 1262; *Semerenko,* 223 F.3d at 176.

Under the *Texas Gulf* standard, the SEC must establish two distinct elements: (1) the misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely and (2) they were material when disseminated. *Semerenko,* 223 F.3d at 176. We have already considered whether the misrepresentations in this case were material. Here, we focus our attention on the first element of *Texas Gulf.* The SEC must show that reasonable investors would base their investment decisions on the *types* of

communications at issue in this case — mass e-mails from a purveyor of internet investment advice.[17]

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[17] Appellants claim that the *Texas Gulf* standard only is relevant when evaluating communications occurring in a particular context — specifically, statements made in corporate communications from issuers to investors. They argue: "The reasonableness standard of *Texas Gulf* is tied to fiduciary duty." (Reply Br. at 11.) And, because they claim that no fiduciary duty runs between a publisher of an investment newsletter and its readers, Appellants submit that the *Texas Gulf* standard cannot properly apply to this case.

Courts, however, have not applied *Texas Gulf* so narrowly. In *Rana Research, Inc.*, for example, an individual interested in acquiring a publicly traded company disseminated a press release falsely claiming that there was a "firm offer" to purchase the company's shares at a certain price, even though the company's president, who was also a major stock-holder, had communicated that the company had no interest in being acquired in a buyout. 8 F.3d at 1360. The potential purchaser had hoped to use the press release as a way of pressuring the company's president to present the offer to the board of directors. *Id.* The Ninth Circuit held that those facts satisfied the "in connection with" requirement, though the potential purchaser owed no fiduciary duty to shareholders of the company. *Id.* at 1362-63.

Similarly, in *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000), the Third Circuit applied *Texas Gulf* to statements made by one company that affect the stock price of a different company. In that case American Bankers Insurance Group, Inc. was the subject of competing tender offers by AIG and Cendant Corp., and Cendant overstated its income in forms it filed with the SEC in conjunction with its tender offer. *Id.* at 170. The Third Circuit held that the *Texas Gulf* standard applied to claims that purchasers of ABI stock brought against Cendant. *Id.* at 176. *Texas Gulf* applied even though Cendant owed no

At first glance, we question whether any reasonable investor would rely on the Super Insider Tip E-mail.[18] As we noted above, the *Texas Gulf*

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fiduciary duties to purchasers of ABI stock. Accordingly, we see no requirement that we limit application of the *Texas Gulf* standard only to statements made in the context of a fiduciary relationship.

We do believe, however, that whether such a relationship exists is relevant to the question of whether a particular communication meets the *Texas Gulf* standard in a particular case. The standard does ask, after all, whether misrepresentations have been disseminated in a medium upon which a *reasonable* investor would rely, and we think it rather self-evident that documents created and dispersed by fiduciaries are more likely to meet the *Texas Gulf* threshold, and thus satisfy the "in connection with" element of § 10(b), than those that are not. On this point we agree with the following observation by the Second Circuit:

> [W]hen the fraud alleged is that the plaintiff bought or sold a security in reliance on misrepresentations as to its value, made by a defendant whose position made it reasonable for the plaintiff to rely on the representation and imposed some duty on the defendant to be honest or to disclose information, then whatever problems there may be with the case, a connection between the fraud and the transaction should not be one of them.

In re Ames Dep't Stores, Inc. Stock Litig., 991 F.2d 953, 967 (2d Cir. 1993).

[18] The record contains scant evidence on this point, but what little information is in the record suggests that reasonable investors would not rely on the communication at issue. For example, the SEC cross-examined one of Stansberry's experts,

standard encompasses "press release[s], annual report[s], investment prospectus[es] or *other such* document[s]." *Rana Research, Inc.*, 8 F.3d at 1362. Courts have applied this standard, for example, when misrepresentations are disseminated in investment research reports from a reputable broker, *see Rowinski*, 398 F.3d at 302; prospectuses, *see In re Lord Abbett Mut. Funds Fee Litig.*, 407 F. Supp. 2d 616, 628 (D.N.J. 2005); the sales and marketing materials at brokerage houses and other points of sale, *In re Dreyfus Mut. Funds Fee Litig.*, 428 F. Supp. 2d 342, 355 (W.D. Pa. 2005); SEC filings, *In re Tyco Int'l, Ltd. Multidistrict Litig.*, No. 02-266-B, 2004 U.S. Dist. LEXIS 20733, at *15-16 (D.N.H. 2004); and detailed drug advertisements published in sophisticated medical journals, *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d at 156. Clearly, the communications at issue in the present case have

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David Nelson, regarding one of the texts that Nelson relied on when preparing his report. The SEC presented the following excerpt:

> Essentially critics of the investment letters have argued that the advisers are ignorant, they may have no formal experience or education in investment, incompetent, their investment record can be bad, dishonest, they can lie about their records, jerks, all of which can be true.

(J.A. at 1212.) Other statements from the text that the SEC pointed to include "Investors newsletters accurate as a coin flip" and "Their advice was no better than throwing a dart at the stock quotes page of the Wall Street Journal and buying whatever it hits." (J.A. at 1215-16.)

little in common with the types of communications that have heretofore led to liability under the *Texas Gulf* standard. *Cf. SEC v. Benson*, 657 F. Supp. 1122, 1131 (S.D.N.Y. 1987) (registration statements and annual and quarterly reports are clearly the types of documents that investors rely on). In fact, we feel confident that a reasonable investor would not base investment decisions on mass e-mail communications such as these — which the SEC's attorney characterized as SPAM during oral argument — that purport to offer a stock tip based on insider information.

Thus, at first blush, it would appear that this factor weighs in favor of Appellants' arguments. We fear, however, that applying the *Texas Gulf* standard to remove Appellants' fraud from coverage under § 10(b) would neglect the reasoning behind the *Texas Gulf* standard. At its core, the *Texas Gulf* standard is about notice — attaching liability under the securities laws for statements made in any medium, no matter how tangentially related to the securities markets, would run the risk of roping in speakers who had no idea that their conduct might implicate Section 10(b). Thus, by requiring that misstatements be communicated in a medium upon which a *reasonable* investor would rely, the *Texas Gulf* standard protects these unknowing speakers from liability and ensures that there is a sufficient nexus between the misrepresentations and the securities sales that they induce to satisfy the Supreme Court's command that the fraud and securities sales "coincide."

This case simply does not implicate the notice concerns that animate the *Texas Gulf* standard. To the contrary, Appellants knew that recipients of the solicitation and USEC Special Report would rely on them when making their investment decisions. After all, Appellants did not target the public at large when they circulated the solicitation e-mail. Rather, Appellants circulated the e-mail solicitation to investors on the specific subscriber lists of internet investment newsletters. These were investors who trusted internet investment advice — Appellants certainly should not have been shocked to learn that their fraudulent statements induced securities transaction. Under these circumstances, an application of the *Texas Gulf* standard to exclude the communications would run contrary to § 10(b)'s core purpose — "to protect investors, to prevent inequitable and unfair practices and to insure fairness in securities transactions generally." 3 Fletcher Cyc. Corp. § 900.65 (perm. ed. 2002). Although ordinary reasonable investors might well have taken one look at Appellants' solicitation and marked it for the SPAM box, Appellants *knew* that they were directing their misstatements to particular investors who *did rely* on internet investment advice. We believe that this knowledge supports finding that the misstatements occurred "in connection with" securities transactions.[19] *See SEC v. Park*, 99 F.

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[19] On this point we take direction from the common law's treatment of the materiality standard. Under the common law, a representation may be material, even if a reasonable man would disregard it, if "the maker of the representation knows or has reason to know that its recipient regards or is likely to

Supp. 2d 889, 900 (N.D. Ill. 2000) ("[F]raud in the sale of investment advice may qualify as 'in connection' with the sale of securities when it is expected that the advisees will act on the advice."

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regard the matter as important in determining his choice of action." Restatement (Second) of Torts § 538(2)(b) (1977). As the comments to the Restatement explain:

> Even though the matter misrepresented is one to which a reasonable man would not attach any importance in determining his course of action in the transaction in hand, it is nevertheless material if the maker knows that the recipient, because of his own peculiarities, is likely to attach importance to it. There are many persons whose judgment, even in important transactions, is likely to be determined by considerations that the normal man would regard as altogether trivial or even ridiculous. *One who practices upon another's known idiosyncrasies cannot complain if he is held liable when he is successful in what he is endeavoring to accomplish.*

Id. cmt. f (emphasis added). While we do not suggest that the Restatement's treatment of materiality controls our analysis of § 10(b)'s "in connection with" requirement, we do note that the Supreme Court often turns to the Restatement to inform its jurisprudence on these issues. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005); *Wharf (Holdings) Ltd.*, 532 U.S. at 596. Moreover, and more importantly, we believe the above principle to be a sound one — Appellants have little room to complain that their conduct has implicated § 10(b) when they knew that readers would rely on the communications and they actively encouraged them to do so.

(citing *R&W Technical Servs. Ltd. v. CFTC*, 205 F.3d 165, 172-73 (5th Cir. 2000)).[20]

v.

As our previous discussion shows, there are at least three reasons to conclude that the fraud in this case occurred "in connection with" the purchase or sale of securities. First, record evidence supports a conclusion that securities purchases were necessary to complete Appellants' fraudulent scheme. Second, such evidence supports the district court's finding that Appellants made their misrepresentations with the intent to induce securities transactions. And, third, Appellants directed the misrepresentations to investors that they knew were likely to rely on them. Given these characteristics, the application of § 10(b) is not barred by the fact that there was no securities trading relationship between the Appellants and the recipients of the e-mail misrepresentations.

Appellants, however, joined by *amici*, argue that our treatment of the "in connection with" requirement raises First Amendment issues: "As

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[20] Our conclusion here does not imply that an individual investor in this case would be able to demonstrate that he "justifiably relied" on the Super Insider Tip E-mail as required to establish a securities violation in a private suit. *See Miller v. Arsenio & Co., Inc.*, 364 F.3d 223, 227 (4th Cir. 2004). Although the two types of reliance may share some similarities, it would not be appropriate to import wholesale our "reasonable reliance" analysis into a "justifiable reliance" analysis required in a private suit.

applied in the way the SEC now urges, § 10(b) would not be restricted to the statements of fiduciaries or those who trade in stocks, but would cover *all* statements about securities by anyone who cared to speak to anyone who cared to listen." (Appellants' Br. at 33.) The great concern is that publishers of financial news and commentary will face potential liability under § 10(b) and that this will chill publishers' attempts to report on financial matters. The *amici*, in particular, point out that financial news and commentary is especially important because so many Americans are actively involved in trading in the securities markets and there is a high demand for information about investment opportunities. Appellants and the *amici* argue that these constitutional concerns require that we interpret § 10(b)'s "in connection with" requirement narrowly, and they suggest that we can do so by recognizing an exception from the coverage of § 10(b) for publishers of nonpersonalized financial news and commentary who do not possess a financial interest in the securities that they discuss.

To support this claim, Appellants direct us to *Lowe v. SEC*, 472 U.S. 181 (1985). In *Lowe*, the Supreme Court faced the question of whether the petitioner, who had been convicted of various offenses involving securities, could be permanently enjoined from publishing securities newsletters because he had not registered as an investment adviser under the Investment Advisers Act of 1940. That Act defines an investment adviser as, and thus requires registration for, "any person who, for compensation, engages in the business of advising others, either

directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . ." 15 U.S.C.A. § 80b-2(a)(11) (West 2009). The Court conceded that the petitioner's activities fell within this definition, but noted that Congress, expressing its recognition of the serious First Amendment problems implicated by a law requiring registration of the press, *see Lovell v. City of Griffin*, 303 U.S. 444 (1938), included a statutory exception for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation," § 80b-2(a)(11)(D). *Lowe*, 472 U.S. at 203-05. The Court, noting that First Amendment concerns "support[ed] a broad reading of the exclusion for publishers," concluded that the petitioner's newsletters were "described by the plain language of the exclusion" and were thus exempt from coverage under the Investment Advisers Act. *Id.* at 205-06, 211.

Appellants argue that the canon of constitutional avoidance, which compelled the Supreme Court to read broadly the exception for publishers in the Investment Advisers Act, like-wise requires that we *create* a new exception for disinterested publishers from the coverage of § 10(b) of the Exchange Act. The district court rejected this argument by reasoning that, even if there were an exception from § 10(b) for such publishers, Appellants could not invoke the exception because the Super Insider Solicitation and the Special Report were not publications "of regular

and general circulation," as the *Lowe* Court interpreted those terms. While we do not agree with its reasoning, we do agree with the district court's ultimate conclusion — that Appellants fall within the coverage of § 10(b).[21] The district court's ultimate conclusion was correct because, quite simply, the text and purpose of § 10(b) admit of no exclusion for "disinterested publishers" of financial news and commentary, thus rendering constitutional avoidance arguments irrelevant.

The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez,* 543 U.S. 371, 381 (2005). The canon is a tool of limited purpose, however. As the Court quite recently explained: "The canon of constitutional avoidance does not supplant traditional modes of statutory interpretation. We

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[21] The "regular and general" requirement relied upon by the district court is a statutory requirement for exclusion under the Investment Advisers Act — it is a representation of how Congress chose to accommodate First Amendment concerns with respect to that particular Act. Appellants argue that, in the § 10(b) context, First Amendment concerns compel an exemption for disinterested publishers regardless of whether the publications are "regular and general." By holding that Appellants were not entitled to an exemption because the publications were not "of regular and general circulation," the district court failed to recognize that such regular and general circulation is not a requirement for the exemption Appellants seek.

cannot ignore the text and purpose of a statute in order to save it." *Boumediene v. Bush,* 128 S. Ct. 2229, 2271 (2008) (citations omitted). Accordingly, we utilize the canon "only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them." Clark,* 543 U.S. at 385. If traditional modes of statutory construction sufficiently resolve the issue, then, there is no need to reach deeper into our toolbox. And, in this case, we believe that ordinary principles of statutory construction foreclose the argument that we can interpret § 10(b) to include an exception for disinterested publishers.

The first step in any case of statutory interpretation is to consider the language of the statute in order "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)). "When the words of a statute are unambiguous, . . . this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 462 (quoting *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992)). Thus, we must first consider the text of § 10(b), and Appellants direct us to the "in connection with" requirement, claiming that the requirement is "exactly the sort of loose, ambiguous language that must be confined to avoid constitutional concerns." (Appellant's Br. at 34.)

We are mindful, however, that "statutes are not read as a collection of isolated phrases." *Abuelhawa v. United States,* 173 L. Ed. 2d 982, 987 (2009). Looking to the entire statute, § 10(b), by its plain language, applies to *any person.* In this respect, § 10(b) is wholly different from the statute the Supreme Court interpreted in *Lowe,* where the Supreme Court used First Amendment concerns in interpreting an *already existing* exception broadly. Section 10(b) excepts no one from its reach, and the *Lowe* Court recognized that the statute constitutes a backstop against fraudulent activity — even those publishers otherwise excepted from the provisions of the Investment Advisers Act remained subject to the coverage of § 10(b). *See Lowe,* 472 U.S. at 209 n.56. Thus, we find Appellants' reliance on *Lowe* unpersuasive, because § 10(b) includes no exceptive language of the type that the Supreme Court interpreted in that case.

Even if we focus solely on § 10(b)'s "in connection with" language, we note that Congress intended the requirement to be flexible. Indeed, the Supreme Court has described § 10(b) as "a catchall clause to enable the Commission to deal with new manipulative or cunning devices." *Hochfelder,* 425 U.S. at 203 (internal quotation marks and alterations omitted); *see also United States v. Russo,* 74 F.3d 1383, 1390 (2d Cir. 1996) ("The purpose of the Section and its implementing regulations is to prevent fraud, whether it is 'a garden type variety of fraud, or present[s] a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.'" (quoting *Bankers Life & Cas.*

Co., 404 U.S. at 11 n.7)). It necessarily must be applied to radically different and ever-evolving sets of facts, and that goal is accomplished by interpreting the statute flexibly.[22] Thus, Appellants' reliance on any ambiguity in the phrase "in connection with" as a reason to employ the canon of constitutional avoidance fails in light of the statute's purpose — providing a flexible regime for addressing new, perhaps unforeseen, types of fraud. Creating a blanket exception for "disinterested publishers" hardly seems consistent with this purpose, and the Supreme Court has required that we avoid "technical[ ] and restrictive[ ]" interpretations of the statute. *Zandford*, 535 U.S. at 819 (internal quotation marks omitted).

E.

To conclude our discussion of § 10(b), we find the district court correctly found that Appellants' conduct

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[22] For example, while originally directed at preventing buyers and sellers of securities from deliberately misleading each other for the purpose of inducing a transaction, *see SEC v. Tambone*, 550 F.3d 106, 122 n.20 (1st Cir. 2008), § 10(b) now covers a variety of fraudulent activity, including insider trading, *see, e.g., Chiarella v. United States*, 445 U.S. 222, 228-29 (1980); a broker's theft of the proceeds from sales of his clients' securities, *Zandford*, 535 U.S. at 822; misstatements by accountants who know that their communications will be communicated to investors, *see Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225-27 (10th Cir. 1996); and even a company's false advertisements in medical journals, *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156-57 (2d Cir. 1998).

constituted a violation of the statute. Appellants made misrepresentations of a material fact — whether an insider had provided the information in the stock tip — and Appellants did so with the requisite scienter. Moreover, the misrepresentations were "in connection with" securities transactions because securities transactions were necessary to maximize the fraudulent scheme, Appellants made their misrepresentations with the intent that investors would rely on them, and Appellants knew that investors would so rely. This conduct violates § 10(b), and Appellants cannot avoid application of the statute by invoking constitutional concerns because the text and purpose of § 10(b) admit of no exception for "disinterested publishers."

III.

We next consider Appellants' argument that, even if their conduct fell within the coverage of § 10(b), the Super Insider Tip E-mail and USEC Special Report constitute speech entitled to some measure of First Amendment protection. Admittedly, our conclusion that constitutional concerns do not compel an exclusion from § 10(b) for Appellants' conduct does not answer this question. The canon of constitutional avoidance is a method of statutory interpretation, not a way of adjudicating constitutional issues. Defendants remain free to bring constitutional challenges to a statute as applied to their conduct, and in this case Appellants argue that the district court should have found that the Super Insider Tip E-mail and USEC Special Report were entitled to the heightened protections for

expression that the Supreme Court recognized in *New York Times Co. v. Sullivan,* because the SEC sought to impose liability on the basis of "pure expression" — Appellants' recommendation of USEC stock. Under this theory the SEC should have borne the burden of proving by clear and convincing evidence that the statements were published with "actual malice," and we would have to engage in an independent review of the record in order to ensure that the SEC met that burden. According to Appellants, the Constitution requires that we recognize these protections whenever we impose liability on the alleged falsity of a publication.

We cannot agree with Appellants. Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment. The Seventh Circuit has articulated this principle in *Commodity Trend Serv., Inc. v. CFTC,* 233 F.3d 981, 992 (7th Cir. 2000), explaining: "Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech." The Supreme Court has stated the principle almost as directly: "[T]he First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 612 (2003). Of course, the government cannot label certain speech as fraudulent so as to deprive it of its constitutional protections, *id.* at 617, but we need not worry about such strategic labeling here because § 10(b) clearly forbids actual fraud. Thus, Appellants' First Amendment argument fails.

IV.

For this same reason, Appellants' challenge to the district court's issuance of an injunction permanently enjoining them from violating §o fails. The injunction does not constitute an unlawful prior restraint because it only enjoins Appellants from engaging in securities fraud, which we have held is unprotected speech.[23]

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[23] Appellants also argue — but only in their reply brief — that the injunction is a disfavored "obey the law" injunction, because the injunction merely tracks the language of § 10(b) and Rule 1 0b-5 in describing the prohibited conduct. Federal Rule of Civil Procedure 65(d) requires that injunctions "describe in reasonable detail . . . the act or acts restrained or required," and several circuits have relied on Rule 65(d) to require that injunctions do more than instruct a defendant to "obey the law." *See, e.g., Burton v. City of Belle Glade,* 178 F.3d 1175, 1201 (11th Cir. 1999); *Payne v. Travenol Labs., Inc.,* 565 F.2d 895,

V.

In conclusion, for the reasons stated above, the judgment of the district court is

AFFIRMED.

897-98 (5th Cir. 1978). Ordinarily we do not consider arguments raised for the first time in a reply brief, and we find no reason to depart from that rule in this case. *See A Helping Hand LLC v. Balt. County*, 515 F.3d 356, 369 (4th Cir. 2008).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

MEMORANDUM OF DECISION

This case was tried before the Court without a jury. The Court has heard the evidence, reviewed the exhibits, considered the materials submitted by the parties and had the benefit of the arguments of counsel. The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. BACKGROUND

A. Defendants

Defendant Agora, Inc. ("Agora") is a Maryland Corporation engaged in the publication and distribution of books, magazines and newsletters. Agora's newsletters address topics ranging from investment and health advice to travel and leisure activities. Pirate Investor, LLC ("Pirate") is a wholly-owned subsidiary of Agora that publishes several investment newsletters. Defendant Frank Porter Stansberry ("Stansberry") is the editor of two of Agora's internet financial newsletters.

There is no doubt that each of the Defendants was engaged in the production and distribution of publications entitled to substantial First Amendment protection. However, as discussed herein, the instant case does not relate to such publications. Rather, the instant case relates to a fraud scheme whereby victims were induced to pay $1,000 each for a "sure thing" stock tip allegedly based upon "inside information" presented separately from Defendants' regular publications.

B. The Scheme

1. Underlying Facts

USEC, Inc. ("USEC") is the world's largest provider of uranium enrichment services. USEC began as an arm of the U.S. government and was privatized in July 1998. As part of a 1993 disarmament pact with Russia called "Megatons to

Megawatts," the U.S. agreed to purchase Russian uranium for use as fuel in commercial nuclear power plants.

USEC and its Russian counterpart, OAO Techsnabexport ("Tenex"), renegotiate the price of uranium periodically. The uranium is purchased in units called separative work units, or "SWUs." New pricing agreements are subject to the approval of the U.S. and Russian governments.

At the end of 2001, an interim pricing agreement between USEC and Tenex expired. In February 2002, USEC and Tenex reached a new pricing agreement, subject to approval by the U.S. and Russian governments. As of May 2, 2002, the United States had not announced approval for the new USEC/Tenex price agreement.

From May 24 to 25, 2002, President Bush and Russian President Vladimir Putin met in Russia for an arms summit. A potential connection between the summit and the approval of the USEC/Tenex price agreement had been raised by USEC in discussions with Bank of America on April 16, 2002.

2. Stansberry's Contact

On May 1, 2002, Stansberry contacted Steven Wingfield, Director of Investor Relations for USEC. Stansberry and Wingfield scheduled a conference call for the following day to discuss USEC's business.

The May 2, 2002, conference call between Stansberry and Wingfield lasted for approximately

one hour. Mary Angeles Major-Sosias ("Major-Sosias"), newly employed as the Manager of Investor Relations for USEC, sat in on the call to learn more about investor relations at USEC. During the call, Major-Sosias took detailed notes.

There was, during the conference call, no communication from Wingfield to Stansberry providing "inside information" regarding USEC. In particular, Wingfield did not tell Stansberry that the USEC/Tenex pricing agreement would be approved on May 22 or tell him to watch the stock on that date.

3. The Super Insider Solicitation

Following the conference call with USEC, on or about May 7, 2002, Stansberry drafted a report regarding USEC (the "Special Report") and a promotional "Super Insider Tip Email" offering the Special Report for sale (the "Super Insider Solicitation"). Both the Special Report and the Super Insider Solicitation were penned under the pseudonym "Jay McDaniel."

The Super Insider Solicitation bore the heading "DOUBLE YOUR MONEY ON MAY 22ND ON THIS SUPER INSIDER TIP." In the Super Insider Solicitation, Pirate offered to sell, for $1,000, the Special Report which it claimed contained "insider" information purportedly obtained from a senior executive at an unnamed company concerning the impending announcement of government approval of a major international agreement. The unnamed company was said to be involved in the nuclear energy field and would earn profit of more than $2.5

billion as a result of an arms treaty between the U.S. and Russia.

The Super Insider Solicitation stated that investors would "make a fortune" because the information was obtained from a senior company executive who was "definitely in a position to know" exactly when the deal between the two countries would be approved. The Super Insider Solicitation also said that investors could "double [their] money on a safe stock in one day" and that Pirate could tell them "exactly which day to buy (May 21st) and sell (May 23rd)." The Super Insider Solicitation encouraged recipients to stake their entire investment portfolios on the tip.

On May 13, 2002 at approximately 6:30 p.m., Stansberry sent the Super Insider Solicitation to the Pirate Blast database, which contained approximately 20,000 e-mail addresses.[1] By the following day, Pirate had sold approximately 107 Special Reports.

From May 14 through May 18, the Super Insider Solicitation was also sent to other lists from Agora financial newsletters and one newsletter not affiliated with Agora. The Super Insider Solicitation was ultimately sent to approximately 800,000 individuals. Pirate sold 1,217 copies of the Special Report. Proceeds from the sale of the Special Report

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[1] Also on May 13, President Bush announced that the U.S. and Russia had reached a new arms reduction agreement.

totaled approximately $1,002,000, of which Stansberry received $200,400.[2]

4. The Special Report

The Special Report disclosed that the unnamed company referred to in the Super Insider Solicitation was USEC. The Special Report stated that "[a] USEC senior executive has assured me that the new Russian. agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said 'watch the stock on May 22.'" Pl.s' Ex. 17.

5. Results

No announcement was made regarding the USEC/Tenex price agreement on May 22, 2002. Indeed, it was not until June 19, 2002 that the State Department and USEC announced the approval of the USEC/Tenex price agreement.

In the five months preceding the May 14, 2002 Super Insider Solicitation, trading volume in USEC common stock averaged approximately 189,000 shares a day at prices ranging from $5.78 to $7.52 a share. From May 14 to May 23, 2002, trading volume in USEC averaged 3.3 million shares a day with a closing price ranging from $7.85 a share on May 14 to

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[2] Pirate's gross receipts from the sale of the Special Report totaled $1,217,000. Pirate refunded a total of $215,000 to 215 purchasers of the Special Report and paid Stansberry a commission of $200,400, leaving Pirate with net receipts of $801,600.

a high of $9.89 a share on May 20, 2002. However, on May 22, 2002, the price of USEC stock fell from $9.54 to $8.20 a share.

On April 18, 2003, the United States Securities and Exchange Commission ("SEC" or "Commission") charged Defendants with securities fraud under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The SEC seeks an accounting, injunctive relief and civil penalties.

II. DISCUSSION

A. Legal Framework

The Commission has charged that Defendants have violated Section 10(b) of the Securities Exchange Act of 1933 (the "'33 Act") and Commission Rule 10b-5. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or any facility of any national securities exchange . . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange, . . .
>
> Any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or

> appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Rule 10b-5, promulgated under Section 10(b), states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme or artifice to defraud, or
>
> (b) To make untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

In enacting Section 10(b), Congress intended "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus achieve a high standard of business ethics in the securities industry." SEC v. Zandford, 535 U.S. 813, 819 (2002). Therefore, the Supreme Court has stated that Section 10(b) should be "construed not technically and restrictively, but flexibly to effectuate its remedial purpose." Id. at 819.

B. Standard of Proof

The Commission bears the burden of proving each element of this civil offense by a preponderance of the evidence. Steadman v. SEC, 450 U.S. 91, 102 (1981); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943).

Defendants contend that the Commission must prove that the statements at issue were false by "clear and convincing evidence" because "liability is sought on pure speech activity on a matter of public concern." See Batson v. Shiflett, 602 A.2d 1191, 1210 (Md. 1992). However, Batson involved allegedly defamatory statements made by a union official against a rival in a ongoing, contentious and conspicuously public campaign. Id. at 1195-98. The instant case involves commercial speech.

The level of protection for commercial speech "turns on the nature both of the expression and of the governmental interests served by its regulation." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). The Defendants' statements at issue, the Super Insider Solicitation and the Special Report,

were purely commercial speech, afforded lesser protection than other forms of expression. See Edge Broad'g Co. v. United States, 5 F.3d 59, 61 (4th Cir. 1992); Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1312-13 (9th Cir. 1997) (stating that the First Amendment only protects commercial transactions that concern lawful activity). The Court does not find it appropriate to require the Commission to prove the elements of its case by more than a preponderance of the evidence.

Nonetheless, the Court finds that the Commission has, in the instant case, established every element of its charges against Defendants Pirate and Stansberry[3] by clear and convincing evidence.

C. Elements of the Charge

To establish a violation of Section 10(b) and Rule 10b-5, the Commission must prove:

1. That the Defendants made a false statement or omission;

2. Of material fact;

3. With scienter;

4. In connection with the purchase or sale of securities;

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[3] But not against Agora.

5. By using a means or instrumentality of interstate commerce.

McConville v. SEC, 465 F.3d 780, 786 (7th Cir. 2006); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; see SEC v. SBM Inv. Certificates, Inc., DKC-06-0866, slip op. at 26 (D. Md. Feb 23, 2007).

D. Proof of Elements

1. Actionable False Statements

a. The False Statements

To satisfy the first element, the SEC must prove that Defendants made an "untrue statement of material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. The SEC "must point to a factual statement or omission - that is, one that is demonstrable as being true or false." Ottman v. Hanger Orthopedic Group, Inc., 353 F.3d 338, 342-43 (4th Cir. 2003); Longman v. Food Lion, Inc., 197 F.3d 672, 682 (4th Cir. 1999) (emphasis in original). The Commission must also then prove that the statement was, in fact, false. See Ottman, 353 F.3d at 343.

The Super Insider Solicitation and the Special Report contain numerous statements that were untrue. Some of the untrue statements may not be

actionable.[4] However, the essential fraudulent element - the misrepresentation that the purveyor of the Special Report had a particular inside source for the precise date on which the stock price would rise - is definitely actionable.

The Super Insider Solicitation states that, for $1,000, a customer would be given the identity of a corporate stock that would have a substantial rise in price on a specific date. The Super Insider Solicitation explained that the reason why the tip being sold had particular value was the inside information on which it was based:

> [B]ecause of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and accounted to the public. ... [t]he deal will close on May 22nd, only a few days from now.
>
> * * *
>
> A high-level corporate executive - someone definitely in a position to know - passed along the details to me. . . . [h]e even told me the precise day the deal would be announced.
>
> * * *

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[4] For example, the use of the pseudonym "Jay McDaniel" or even the predictive nature of some statements.

> I can even tell you exactly which day the pop in the stock should happen. Like I told you, it's a Wednesday later this month - May 22nd.
>
> * * *
>
> I can tell you precisely when. . . . I can even tell you exactly which day to buy (May 21st) and sell (May 23rd).

Pl.'s Ex. 1.

Some 1,217 customers were persuaded by the Super Insider Solicitation to buy the Special Report, paying a total of more than $1,000,000 to be advised that it was a senior executive of USEC who had provided the inside information on which the customers could rely to buy USEC stock on May 21 and sell at a profit on May 23.

Both the Super Insider Solicitation and the Special Report included the actionable false statement that a senior executive of a company (identified in the Special Report as USEC) had told the author of the May 22 date on which the contract would be approved and, therefore, the stock price would rise. The critical statement is not categorizable as "puffery"[5] or a prediction of a future event but

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[5] Puffery involves "forward-looking statements, or . . . generalized statements of optimism that are not capable of objective verification." Grossman v. Novell, Inc., 120 F.3d 1112, 1123 (10th Cir. 1997). Similar to statements of "soft information," "puffery" is generally nonactionable because

rather is the false statement of an alleged existing fact - that is, the asserted past receipt of inside information from a senior USEC executive who was in a position to know when the pricing agreement would be approved. Nor are the actionable false statements in the instant case merely opinion.[6] The Court finds that the SEC has established that the Super Insider Solicitation and the Special Report include actionable false statements - to the effect that the author was basing his statement as to a May 22,

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reasonable persons do not rely on such assertions in making investment decisions. Raab v. Gen. Physics Corp., 4 F.3d 286, 289-90 (4th Cir. 1993); see also Zerman v. Ball, 735 F.2d 15, 21 (2d Cir. 1984) (finding nonactionable a statement that a bond is "marvelous"); Rotstein v. Reynolds & Co., 359 F. Supp. 109, 113 (N.D. Ill. 1973) (finding a statement that a stock is so "red hot" that the investor "could not lose" to be puffery).

[6] In Biospherics, Inc. v. Forbes, Inc., the Fourth Circuit held that statements in a Forbes investment column that a certain company's stock would "sour" and that "hype and hope" had driven up its share price were not actionable, stating:

> any reasonable person reading [the article] would recognize, based on the tenor, language, and context of the article, that the challenged statements constitute a subjective view, not a factual statement. When a speaker plainly expresses "a subjective view, an interpretation, a theory, conjecture or surmise, rather than [a] claim[ ] to be in possession of objectively verifiable [false] facts, the statement is not actionable."

151 F.3d 180, 182 (4th Cir 1998) quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

2002 rise in stock price upon statements made to him by a senior executive of USEC in a position to know when the price agreement would be approved.[7]

The Court does not find credible Stansberry's testimony that in the May 2, 2002 conference call, Wingfield provided him with information that there would be an announcement of approval of the USEC pricing agreement on May 22, 2002 or any other particular date. Nor was there any statement from Wingfield indicating that Stansberry should "watch the stock on May 22" or anything of the sort.

The Court finds credible the testimony of Wingfield and Major-Sosias regarding the May 2, 2002 telephone conference with Stansberry. As related in Wingfield's notes of the May 2, 2002 conference call:[8]

> I told Stansberry that we were working closely with the government and, as stated on the conference call, expected the agreement to be approved by the government in the near term. In

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[7] The Court is not holding that a sale of inside information is per se illegal or fraudulent. The Court's holding is not dependent upon a finding that the alleged information from Wingfield - if it had been provided - would have been "inside information." Rather the actionable fraud was the statement of the source of the information sold to have been a corporate executive in a position to know, when there was no such source.

[8] Memorialized on May 14, 2002.

> response to questions about the Bush and Putin summit meeting in May, I said that we hoped something positive about our deal would come out of that meeting. I told him to check back with us after that meeting.

Trial Tr. 65, Mar. 21, 2005.

The Court finds no basis to believe, as Stansberry asserts, that Wingfield, USEC's Director of Investor Relations, would tell a newsletter writer nonpublic inside information that could expose Wingfield and USEC to personal and corporate liability.[9]

In sum, the Court finds that the SEC has established that the Super Insider Solicitation and Special Report contain the actionable false statement that a USEC executive (Wingfield) had told the author that the stock price would rise on May 22, 2002.

b. Stansberry and Pirate Made the False Statements

Of course, the SEC has proven that Stansberry made all of the statements in the Super Insider Solicitation and the Special Report inasmuch as he

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[9] The Court finds preposterous Stansberry's statement that Wingfield became angry during the May 2, 2002 conference call when Stansberry indicated that he was not going to write about USEC in his newsletter and acted upon his anger by providing inside information.

has admitted that he, using the pseudonym Jay McDaniel, was the author of the communications.

Pirate also made the statements at issue. The Super Insider Solicitation was sent to a Pirate distribution list and contained a link where a recipient could purchase the Special Report from Pirate. Pl.s' Ex. 1. The Special Report included a copyright claim by Pirate. Pl.s' Ex. 17. Moreover, the pseudonym "Jay McDaniel" is frequently used by Pirate writer Jody Madron and was, with Pirate's consent, used by Stansberry to make the statements at issue. Furthermore, Stansberry testified that with regard to Pirate: "there's no doubt about it, I run the show." Trial Tr. 169, Mar. 22, 2005.

The SEC has not proven that Agora - as distinct from its subsidiary Pirate - made the statement at issue. In the instant case, the SEC asserts liability against Agora only on the basis that it could be found to have made the statement itself. See Stipulated Facts, Joint Proposed Pre-Trial Order [Document 76] at 13, ¶ 2. Accordingly, Agora is not liable for the charge at issue.

Neither the Super Insider Solicitation nor the Special Report contained any indication that it was sent by Agora or that Agora (as distinct from its subsidiary) was adopting or expressing a belief as to the truth of the statements therein.

The Commission asserts that Agora is liable for the statements made because its legal counsel reviewed the Super Insider Solicitation and the Special Report, but did not independently fact-check

it. However, Agora's legal counsel was also legal counsel for Pirate. Trial Tr. 208-09, Mar. 22, 2005. Thus, the Court does not find that counsel, while doing his review, was acting for Agora as distinct from Pirate.

Moreover, even if the attorney had been acting for Agora as well as Pirate, that would not establish that Agora made the false statements in the communications. See Great Neck Capital Appreciation Inv. P'ship v. PricewaterhouseCoopers, L.L.P., 137 F. Supp. 2d 1114, 1121 (E.D. Wis. 2001) (auditor who reviewed press release and advised that it conformed to Generally Accepted Accounting Principles not liable under §10(b) as a primary violator for misstatements in the press release because there was no allegation that auditor drafted the release, publicly adopted it or allowed its name to be associated with it).

The Court does not accept the SEC's contention - if it is being pressed - that Agora is to be considered to have made the statements in the Super Insider Solicitation and Special Report by virtue of its ownership and ability to control Pirate. The Court does not find that Agora itself made the false statements at issue.

2. Materiality

It is not sufficient for liability under Section 10(b) or Rule 10b-5 that Defendants made a false statement of fact; the fact must have been material. A fact is material if a substantial likelihood exists "that disclosure of the omitted fact [or statement of

the untrue fact] would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). In assessing materiality, the Court must consider the allegedly false statement within the context of the other information that was publicly available to reasonable investors at the time the alleged false statement was made. See Phillips v. LCI Int'l, Inc., 190 F.3d 609, 617 (4th Cir. 1999).

There must be a "substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information available to be significantly altered by disclosure of the fact. Ottman, 353 F.3d at 343 (internal citations omitted). The Court need not find that the fact would alter an investor's decision to purchase or sell the security; the Court need only find that a reasonable investor would consider the information to be important. Folger Adam Co. v. PMI Indus., Inc., 938 F.2d 1529, 1535 (2d Cir.); SEC v. Nat'l Student Marketing Corp., 457 F. Supp. 682, 709 (D.D.C. 1978). In the instant case, the SEC has proven that the actionable false statement was material.

The actionable falsity in the instant case is the lie that "Jay McDaniel" had been told by a USEC executive that government approval of the pricing agreement would be announced on May 22, 2002. The materiality of this statement is self-evident and also supported by specific evidence. The essence of the

false information is not only that the highly beneficial pricing agreement would be announced on May 22, 2002, and that the date had been communicated by a senior USEC executive, but also that the market in general does not know what purchasers of the Special Report will learn for their $1,000. As touted by the Super Insider Solicitation, access to this not-widely-known information will give tipees the opportunity to buy a stock that will "skyrocket."

Furthermore, the SEC has presented the testimony of investors that they felt that tip was important, in particular, because it allegedly came from a senior USEC executive. See Trial Tr. 7, Mar. 24, 2005 (investor Roger Listwan testifying that it was important to him that the Super Insider Solicitation said that a senior company executive had said to watch the stock and that the pricing agreement would be announced on May 22, 2002); id. at 24-26 (testimony of investor David Todd Cheatham that the specific date and alleged source of the information in the Super Insider Solicitation was important in his decision to invest in USEC).

Moreover, many individuals who purchased the USEC report later requested refunds from the Defendants. These individuals also complained about the lack of an announcement from USEC on May 22, 2002 or the denials by USEC of the claims in Defendants' Super Insider Solicitation or the USEC Special Report. See Pl.'s Ex. 49.

In addition to the investors who requested refunds, many investors posted negative sentiments

about the lack of a May 22 announcement on Defendants' message boards. See Pl.s' Ex. 58, 59, 61, 65, 66. Pirate had never had so many complaints about a report prior to the USEC Special Report. Trial Tr. 31, Mar. 29, 2005 (testimony of Elyssa Yankelov, customer service for Pirate). Customers complained about the false information and the use of a pen name in the Special Report and theorized that it was just part of a fraudulent scheme, among other things. Id. at 32-34. Employees of USEC received phone calls from individuals who had purchased the USEC Special Report and demanded to know when the pricing agreement announcement was coming. Trial Tr. 100, 103, Mar. 21, 2005; Trial Tr. 31, Mar. 22, 2005. Wingfield testified that callers were angry that USEC had not made the promised announcement. Trial Tr. 90, Mar 21, 2005.

Market data contemporaneous with the statements also confirms the materiality of the false statements. On May 13, 2002, the day before the Super Insider Solicitation, the trading volume of USEC's stock was 49,900 shares, and the average volume of the previous 30 days was 127,080 shares. See Pl.'s Ex. 170. On May 14, before the markets closed, President Bush announced that an arms control deal would be signed with Russia in the near future.[10] Though USEC did not make an

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[10] Defendants argue that it was President Bush's speech that caused the jump in price and volume on May 14, and in that assertion they are correct. The President's speech was in the middle of the day, leading to market reaction by at least 3:30 p.m. The Super Insider Solicitation was not disseminated

announcement on its perception of the deal's effect on the price of Uranium, USEC's stock volume jumped to 1,446,600, an increase of 1,396,700 shares over the previous day's trading volume. After the markets closed that evening, Stansberry and Pirate sent the Super Insider Solicitation. The next day, May 15, trading volume in USEC jumped even more dramatically, up to 4,765,600 shares, an increase of 3,319,000 shares. The volume continued to increase after May 14, peaking at 6,053,000 shares on May 21, the day that the Super Insider Solicitation had identified for investors to purchase USEC's stock. See id. The May 21 volume was ten times larger than the 30-day average volume of 673,773 shares and more than two million shares greater than the previous day. After May 21, when the May 22 approval of the pricing agreement did not take place, trading in the stock decreased steadily over the next few days. See id. On May 22, trading volume in USEC dropped by 3,677,600 shares, and on May 23, the volume dropped by another 1,137,400 shares.

The price of USEC's stock had made an ascent, from $7.85 on May 14 (the day the Super Insider Solicitation came out after hours) to $8.95 on May 15, the first trading day after the Super Insider Solicitation. The price continued to climb, reaching

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until 6:30 p.m., after U.S. markets were closed. However, the increased jump in price and volume the next day cannot be ascribed fully to the President's speech that did not directly pertain to USEC, in contrast to Defendants' false statements that related specifically to USEC.

$9.54 on May 21. On May 22, the share price abruptly dropped by $1.34 per share.

The sudden and drastic increase in trading, beginning the first trading day after the Super Insider Solicitation, and climaxing on the date the Super Insider Solicitation and Special Report instructed tipees to purchase USEC's stock, confirms that the market found May 21 to be a significant buy date for USEC. Defendants have presented no evidence that any other newsletter writer, journalist or investment advisor had pegged May 21 as an important buy day for USEC.

Defendants argue that their statements have not "altered the mix" of information because it is not "substantially likely" that a reasonable investor would believe that disclosure of the untrue fact and nothing but the untrue fact would "alter the 'total mix' of information available." Phillips v. LCI, Int'l, Inc., 190 F.3d 609, 619 (4th. Cir 1999); Defs.' Tr. Brief [Document 100] at 14 (arguing that "[t]he evidence in the record simply does not support the SEC's theory that it was the USEC report that altered the mix of information in the stock market on or about May 14, 2002.").

Defendants seek to paint a picture of a market with positive information about USEC and speculation as to whether and when it will agree to a new contract that will provide USEC with additional profitability and return to shareholders. However, the Super Insider Solicitation and Special Report altered the mix of information. These communications falsely represented that tipees

would receive not generally known information as to the specific day on which the generally anticipated good corporate news would be made public based upon a particularly reliable alleged source. The mix of information made available to the buying tipees - who paid $1,000 to get the false information - most certainly altered the mix of information available to them.

The Court well recognizes that statements as to future events are nonactionable under Rule 10b-5 if accompanied by "detailed and meaningful cautionary language tailored to the specific risks" that sufficiently "bespeaks caution" to the reasonable investor. Raab v. Gen. Physics Corp., 4 F.3d 286, 290 (4th Cir. 1993). Such statements of opinion, predictions, forecasts, projections, and other subjective analysis or extrapolation constitute "soft information" and are generally nonactionable because reasonable investors and market observers typically discount or disregard such statements. Id.; In re Verifone Sec. Litig., 784 F. Supp. 1471, 1482 (N.D. Cal. 1992), aff'd, 11 F.3d 865 (9th Cir. 1993) (observing that investors know the "inaccuracy inherent in forecasting"). The "bespeaks caution" doctrine has been employed by various courts to dismiss claims of securities fraud if cautionary language sufficiently negates the materiality of the alleged misrepresentations or omissions. Gasner v. Board of Sup'rs, 103 F.3d 351, 358 (4th Cir. 1996); In re Donald J. Trump Casino Sec. Lit., 7 F.3d 357, 371 (3d Cir. 1993), cert. denied sub nom Gollomp v. Trump, 510 U.S. 1178, (1994); see also Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir.

1991); I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 763 (2d Cir. 1991); Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 (1st Cir. 1991); Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986); Polin v. Constructron Corp., 552 F.2d 797, 806 n.28 (8th Cir. 1977), cert. denied, 434 U.S. 857, (1977).

Predictions and general expressions of opinion about future events are not actionable under Section 10(b) and Rule 10b-5 if (i) the speaker truly believes the statement, (ii) there is a reasonable basis for the belief, and (iii) the speaker is not aware of any undisclosed facts that would seriously undermine the accuracy of the statement. In re Apple Computer Sec. Litig., 886 F.2d 1109, 1113 (9th Cir. 1989); see also Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1093-94 (1991).

Defendants attempt to categorize the language in the Super Insider Solicitation and Special Report as cautionary. However, they point to no "detailed and meaningful cautionary language tailored to the specific risks" of investing in USEC on the basis of Defendants' representation that they had been informed by a senior USEC executive that the pricing agreement would be announced on May 22. See Raab, 4 F.3d at 290. To the contrary, Defendants' false statements are precise, with no warnings or articulation of the dangers or uncertainties of investing in this stock based on the information presented. The first three paragraphs in Defendants' Super Insider Solicitation set the tone:

> I've recently learned the details of a major international agreement between the United States and Russia that will create more than $2.5 billion for one small U.S. company.
>
> Investors in this company are going to make a fortune - for reasons that I can detail for you here. And, best of all, because of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public.
>
> The deal will close on May 22nd, only a few days from now.

Pl.'s Ex. 1 (capitalization in original).

No cautionary language accompanies the false statements in the Super Insider Solicitation or the Special Report. See id. Furthermore, the Court finds that Defendants' false statements were made knowingly. The "bespeaks caution" defense is not available for the defense.

3. Scienter

Scienter is a state of mind embracing intent to deceive, manipulate or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976); Svezzese v. Duratek, Inc., No. 02-1587, slip op. at 4 (4th Cir. June 12, 2003). It requires a showing that defendant acted "other than in good faith," Hochfelder, 425 U.S. at 206, or that the defendant "lacked a 'genuine belief

that the information disclosed was accurate and complete in all material respects.'" In re Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1244 (3d Cir. 1989) (citation omitted).

Defendant Stansberry did not have, indeed, could not possibly have had a belief that the information he provided in the Super Insider Solicitation and Special Report was correct in all material respects. In particular, Stansberry knew full well that Wingfield had not told him that the pricing agreement would be announced on May 22. Furthermore, Stansberry intentionally made false statements about the company (USEC) to induce the recipients of the Super Insider Solicitation to pay $1,000 for the Special Report that completed the intentionally false statements. See Spier v. Erber, 759 F. Supp. 1024, 1030 (S.D.N.Y. 1991) (finding that defendant "knew that [their] representations were false, and intentionally made such false representations in order to induce" plaintiff to take an action gave rise to the "strong inference of scienter") (internal citations omitted).

The Court finds that Stansberry's scienter is imputed to Pirate because he effectively controlled Pirate and made the statements at issue on behalf of Pirate as an agent of Pirate, within the scope of his agency.

Even if Stansberry's scienter were not imputed to Pirate, the SEC has proven Pirate's scienter nonetheless. A statement may be actionable if it is made with "reckless disregard for its truth or falsity." Eisenberg v. Gagnon, 766 F.2d 770, 776 (3d Cir.

1985) (citations omitted). "The securities laws generally define recklessness as an act 'so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Phillips, 190 F.3d at 621.

The evidence established that Pirate acted with "reckless disregard for [the] truth or falsity" of the statements. Eisenberg, 766 F.2d at 776. George Rayburn testified that it was Pirate's usual practice to have an editor review and confirm the accuracy of the content of all editorial publications. Trial Tr. 5, Mar. 29, 2005 However, that procedure was not followed in regard to the Super Insider Solicitation and Special Report because Stansberry was both author and editor. As a result, there was no independent verification of the facts in the Super Insider Solicitation or the Special Report. Id.

Simply allowing one person to author, edit, and publish information without editorial or other review to authenticate its claims eviscerates the editing procedures of Pirate and evidence a reckless disregard for the truth of the statement. Furthermore, the nature of the bombastic claims in the Super Insider Solicitation and the Special Report should have caused a reasonable editor or manager at Pirate to inquire about the source. After all, Stansberry was claiming to have inside information from a USEC senior executive and was telling customers to buy and sell on specific days. Any

reasonable editor or manager would have realized the potential legal and financial exposure to Pirate should that information have been incorrect, or as it turned out, fabricated. Abdicating all editorial authority to the proponent of such a statement evidences a reckless disregard for the truth by Pirate.

Accordingly, even if Stansberry's statements were not attributable to Pirate, the Court would find Pirate to have acted with scienter in regard to the false statements at issue.

4. In Connection With the Purchase or Sale of a Security

A fraudulent action is "in connection with" the sale of a security when someone utilizes a device "that would cause reasonable investors to rely thereon" and "so relying, cause them to purchase or sell a corporation's securities." In re Carter-Wallace, Inc. Sec. Litig., 150 F.3d 153, 156 (2d Cir. 1998) (citation omitted); SEC v. Savoy Indus., 587 F.2d 1149, 1171 (D.C. Cir. 1978) (the "in connection with" requirement is satisfied when it "may reasonably be expected that a publicly disseminated document will cause reasonable investors to buy or sell securities in reliance thereon, regardless of the motive or existence of contemporaneous transactions by or on behalf of the violator").

This element of Section 10(b) and Rule 10b-5 is to be construed broadly and flexibly to effectuate its remedial purpose. SEC v. Zandford, 535 U.S. 813, 819 (2002). Section 10(b) and Rule 10b-5 are flexible enough to encompass many varieties of fraudulent

schemes, not simply the "garden type variety of fraud." 742 F.2d 592, 596 (11th Cir. 1984). Defendants need not have a fiduciary responsibility to the recipients of the false statements; it is enough if Defendants' actions affected the price of the stock or induced others to purchase the stock. See United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd., 210 F.3d 1207, 1221 (10th Cir. 2000) (finding the "in connection with" requirement satisfied where a defendant used knowingly false statements to induce another to purchase a security); In re Cascade Int'l Sec. Litig., 894 F. Supp. 437, 444 (S.D. Fl. 1995) (stating that the "in connection with" requirement can be met if the plaintiff alleges that the statements of defendant affected the price of the stock); SEC v. Terry's Tips, Inc., 409 F. Supp. 2d 526, 533 (D. Vt. 2006) (finding that a newsletter publisher who deceived customers through promises of unreasonable returns if they invested in the market could satisfy the "in connection with" requirement).

Defendants argue that "[n]o court has ever imposed liability under Section 10(b) and Rule 10b-5 based on nothing more than commentary or predictions concerning recommended stocks." Defs.' Trial Br. [Document 93] at 3 (emphasis in original). Even if accurately stated, this prohibition would not render the false statements at issue immune from Rule 10b-5. The Super Insider Solicitation and Special Report did more, significantly more, than provide a commentary or prediction. These documents provided the false statement that purchasers of the Special Report would obtain information not generally available from USEC as to

the precise date on which a specific event would cause the corporate stock to "skyrocket."

Defendants further argue that should they be held liable, the government and private litigants would be free to file Section 10(b) or Rule 10b-5 actions against "any and all publishers of financial information." Id. However, the statements at issue were not made in a "publication" of the type accorded special protection from suit. In this case, Stansberry and Pirate - although they may have been otherwise engaged in producing publications entitled to heightened protection - were not so engaged in regard to the fraudulent scheme at issue.

The defense also urges the Court to conclude that Carter-Wallace stands for the proposition that a defendant must have a fiduciary duty to those to whom it speaks to be held liable for securities fraud. Defs.' Trial Br. [Document 98] at 5. The Court does not read Carter-Wallace to so hold.

The very essence of the fraudulent scheme was to induce its victims to purchase USEC stock prior to May 22, 2002 and, of course, to pay some $1,000 for the privilege of being misled to believe that there was a particular plausible specific reason to do so. The Court concludes that the SEC has proven that the false statements at issue were made in connection with the purchase or sale of a security.

5. Use of an Instrumentality of Interstate Commerce

To establish a violation of Section 10(b) and Rule 10b-5, the SEC had to prove that Defendants used "any means or instrumentality of interstate commerce" to engage in the fraudulent conduct. 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5; SEC v. Solucorp Indus., Ltd., 274 F. Supp. 2d 379, 418-19 (S.D.N.Y. 2003).

There is no doubt as to the interstate commerce nexus of the scheme at issue here. The Super Insider Solicitation was sent by email, undoubtedly an instrumentality of interstate commerce. United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997); see United States v. Thomas, 74 F.3d 701, 706-09 (6th Cir. 1996).

E. Asserted Defenses

1. Proof of Malice Not Required

Defendants argue that the false statements at issue were made in the course of a "pure speech activity," so that they cannot be liable for a violation of Rule 10b-5 unless there is clear and convincing proof of actual malice.

In New York Times v. Sullivan, the Supreme Court considered the affirmation by the Alabama Supreme Court of a jury verdict finding the New York Times liable for libel per se because of a private advertisement in the Times that contained false statements about a public official, one of the City

Commissioners of Montgomery, Alabama. 376 U.S. 254, 262-64 (1964).

The United States Supreme Court reversed on the basis that the "rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." Id. Under the proper safeguards, the Court continued, "the evidence presented in this case is constitutionally insufficient to support the judgment for respondent." Id. at 265.

The Supreme Court noted that although the statement in question had been published in a paid space in the Times, "[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." Id. at 266. To hold otherwise, the Supreme Court noted, would discourage newspapers from carrying "editorial advertisements" and "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities - who wish to exercise their freedom of speech even though they are not members of the press." Id. With regard to the commercial nature of the statements, the Court held that "allegedly libelous statements [which] would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection

because they were published in the form of a paid advertisement." Id. After a lengthy discussion of the importance of free discussion of political ideas, the Supreme Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80.

Defendants assert that their statements are "pure speech" in the same character as the political speech at issue in Sullivan. This Court disagrees.

The Super Insider Solicitation and Special Report are commercial speech entitled to lesser protection under the First Amendment than the pure speech involved in Sullivan. The Super Insider Solicitation to purchase the Special Report was a communication with no purpose other than to "propos[e] a commercial transaction." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980).

"The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Id. at 563. The government may "ban forms of communication more likely to

deceive the public than to inform it." Id.; see Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748, 771 (1976) (stating that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake"); Nat'l Life Ins. v. Philips Publ'g, 793 F. Supp. 627, 646 (D. Md. 1992) (stating that in order to receive First Amendment protection, commercial speech "must be neither misleading nor related to unlawful activity.") (citing Cent. Hudson, 447 U.S. at 654). Specifically, the government may regulate communications with regard to the "exchange of information about securities" without offending the First Amendment. Ohralik v. Ohio State Bar, 436 U.S. 447, 453-54 (1978) (citing SEC v. Tex. Gulf Sulfur Co., 401 F.2d 833 (2d. Cir. 1968)). This is because communications concerning the sale and purchase of securities form "a distinct category of communications in which the government's power to regulate is at least as broad as with respect to the general rubric of commercial speech." SEC v. Wall Street Publ'g, 851 F.2d 365,. 373 (D.C. Cir. 1988).

Most importantly, "the First Amendment does not shield fraud." Illinois v. Telemarketing Assoc., 538 U.S. 600, 612 (2003). The government's power to protect the people from fraud is "firmly established." Id. The intentional lie is "no essential part of any exposition of ideas" Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); see Telemarketing Assoc., 538 U.S. at 612.

Defendants do not challenge the ability of Congress to enact Section 10(b) or the Commission to promulgate Rule 10b-5, but rather seek to color their

statements with the hue of political discourse, as in Sullivan. However, the communications at issue are not pure speech and the SEC does not bear the burden of proving actual malice in Defendants' statements by clear and convincing evidence, as was necessary on the facts in Sullivan.

The communications at issue were not within publications addressing matters of political, social or intellectual interest. The Super Insider Solicitation was a fraudulent commercial solicitation to purchase a product. The Court does not find such a communication entitled to the First Amendment protection provided by Sullivan.

The SEC has proven scienter on the part of Stansberry and Pirate. It was not required to prove malice.

2. The "Disinterested Publisher" Defense

In actions brought under the Investment Adviser Act of 1940 ("Advisers Act"), there is a defense available for "the publisher of [a] bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a) (11) (D) (2003); Lowe v. SEC, 472 U.S. 181, 204 (1985). There is an unresolved question of whether the "disinterested publisher" defense would be available in a Section 10(b) or Rule 10b-5 charge.

A judge of the District Court for the District of Columbia has held that the "disinterested publisher"

defense is applicable to Section 10(b) or Rule 10b-5 actions. In SEC v. Wall St. Publ. Inst., Inc., 591 F. Supp. 1070 (D.D.C. 1984), the SEC brought a civil action against the publisher of Stock Market Magazine, alleging violations of the Advisers Act and sections 17(b) and 10(b) of the Exchange Act. The district court initially held for the SEC, finding that because the magazine's statements were false and misleading, the "in connection with" element was met.

During the pendency of the defense's appeal, the Supreme Court decided Lowe v. SEC, which, as discussed above, recognized a "disinterested publisher" defense in a case involving the Exchange Act. 472 U.S. 181 (1985). The District of Columbia Circuit remanded Wall Street for further proceedings in light of Lowe. On remand, the Wall Street district court reversed its position and held that the representations made in the publication in question were not "in connection with the purchase or sale of a security" because the actionable statements were made in a bona fide publication with general and regular circulation. SEC v. Wall St. Publ. Inst., Inc., 664 F. Supp. 554 (D.D.C. 1986).

Although the SEC appealed from the second Wall Street district court decision, it did not present an issue as to the dismissal of the Rule 10b-5 claim on appeal. SEC v. Wall St. Publ. Inst., Inc., 851 F.2d 365, 368 (D.C. Cir. 1988).

Therefore, there is no appellate decision with regard to a "disinterested publisher" defense in a Rule 10b-5 case. Hence, a question of first impression

would be presented if Stansberry and Pirate were "disinterested publishers."

In order for Stansberry and Pirate to be "disinterested publishers" of the publications at issue (the Super Insider Solicitation and Special Report), two conditions must be met: (1) the publication must be "bona fide," and (2) it must be "of regular and general circulation." Lowe, 472 U.S. at 206. These "two qualifications precisely differentiate 'hit and run tipsters' and 'touts' from genuine publishers." Id. The focus is on the nature of the publication, and not the general character of the publisher. Id. at 208.

A bona fide publication is one that contains disinterested commentary and analysis as opposed to promotional material disseminated by a "tout." Id. at 206. Of course, the "mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser." Id. at 208.

A publication with a "general and regular" circulation is one that is offered to the general public on a regular schedule. Id. at 206. Stated in the converse, publishing a newsletter of "general and regular" circulation does not include the issuance of "bulletins from time to time on the advisability of buying and selling stocks . . . or 'hit and run tipsters.'" Id. (citation omitted).

In Lowe, the Court described the publication before it as "a public forum in which typically anyone may express his views." Id. The "bona fide"

requirement can best be translated as "genuine." Id. at 209. With regard to the specific publication, the Lowe Court noted that "there is no suggestion that [the publication] contained any false or misleading information . . . . [or] that they have been timed to specific market activity, or to events affecting or having the ability to affect the securities industry." Id. The Lowe Court was convinced that "[t]o the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt of the protected character." Id. at 209-10.

As to the communications at issue, Stansberry and Pirate are not "disinterested publishers" because the Super Insider Solicitation and Special Report are not "of regular and general circulation." The Special Report was not, by any standard, "of general and regular circulation." The Special Report was only provided to the recipients of the Super Insider Solicitation who paid $1,000 to get the name of the company stock touted in the Super Insider Solicitation.

The defense contends that the Super Insider Solicitation was part of a series called "The Blast," which had been sent on an almost daily basis since February 2000. Even if the Super Insider Solicitation had been part of a semi-regular series of email circulations, if those other emails were of the same character, the frequency of issuance would not make them publications of general and regular circulation. At most, the series would be akin to regular mailings

from a retailer sending alerts of sales and special deals to potential customers.

Finally, it must be noted that in the scheme at issue, the Super Insider Solicitation had no value without the Special Report. That is, after all, why the Super Insider Solicitation was distributed to hundreds of thousands of recipients for free. It was only upon payment of $1,000 and receipt of the by no means generally available Special Report, that the message was delivered - that is that it was a USEC employee, in a position to know who had provided the precise date on which the corporate stock price would "skyrocket."

Accordingly, Stansberry and Pirate would not be entitled to the "disinterested publisher" defense even if it were available in a Rule 10b-5 case.

3. USEC's Failure to Correct False Rumors

According to Defendants, USEC "has affirmative duties imposed upon it by the NYSE to correct false rumors about the corporation that cause unusual market activity. Def.s' Trial Br. [Document 94] at 1. Defendants assert that the New York Stock Exchange, on which USEC is listed, requires listed companies to correct false rumors in the marketplace. The NYSE's Listed Company Manual states that:

> The market activity of a company's securities should be closely watched at a time when consideration is being given to significant corporate matters. If

> rumors or unusual market activity indicate that information on impending developments has leaked out, a frank and explicit announcement is clearly required. If rumors are in fact false or inaccurate, they should be promptly denied or clarified.

NYSE Rule 202.03. Even if USEC did have a duty to correct the rumor[11] and breached that duty, Defendants would not be absolved of liability. Defendants made false statements that influenced tipees' decisions to purchase the stock of USEC.

Defendants also argue that USEC's failure to correct the rumor is evidence that Stansberry's statement was, in fact, true. Such "evidence" - if it is evidence at all - would be, in any event, nonpersuasive.

F. Remedial Action

1. Injunctive Relief

The Commission has requested that the Court enter an injunction, pursuant to Federal Rule of Civil Procedure 65(d), enjoining Defendants from violating Section 10(b) or Rule 10b-5 in the future. Where a violation of securities law has been found, a court is vested with broad discretion in deciding whether to

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[11] The Court by no means so holds.

grant injunctive relief. SEC v. Am. Realty Trust, 429 F. Supp. 1148, 1175 (E.D. Va. 1977)

Defendants attempt to avoid an injunction by characterizing it as an unconstitutional prior restraint of speech. While Defendants are correct that there is a "heavy presumption" against the constitutional validity of a restraint of communication, such a presumption does not apply when a Court enjoins activity not protected by the First Amendment. See Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The Commission does not seek to enjoin Defendants from engaging in protected speech, but from engaging in fraud in commercial speech, an activity that is not protected by the First Amendment. See Telemarketing Assoc., 538 U.S. at 612.

Defendants contend that Courts have "routinely rejected" injunctive relief when faced with instances of similar or even more egregious conduct. Def.s' Trial Br. [Document 106] at 5. The Court does not find there to have been any such "routine" rejection or even that the decisions referred to by the defense are particularly pertinent to the instant case. E.g. SEC v. Sargent, 329 F.3d 34, 39 (1st Cir. 2003) (consultant gave inside information to his dentist); SEC v. Ingram, 694 F. Supp. 1437, 1442 (C.D. Cal. 1988) ("genuinely contrite and repentant" defendant with small financial gain and evidence of scienter, though sufficient to sustain the violation, not overwhelming); SEC v. Yun, 148 F. Supp. 2d 1287, 1294 (M.D. Fla. 2001) (defendant was contrite and would no longer have access to insider information).

In stark contrast, Stansberry and Pirate made substantial profit, scienter has been overwhelmingly established, and there would be ample future opportunities for Stansberry and Pirate to engage in fraudulent schemes of the type established herein. Nor is there any evidence of contrition.[12]

In order to obtain the requested injunction, the SEC must establish a "reasonable and substantial likelihood" that the Defendants will violate securities laws in the future. SEC v. Youmans, 729 F.2d 413, 415 (6th Cir. 1984); SEC v. Fehn, 97 F.3d 1276, 1295 (9th Cir. 1996). In ascertaining the likelihood of future violations, no single factor is determinative; the Court should look at "the totality of the circumstances and factors suggesting that the infraction might not have been an isolated occurrence." Fehn, 97 F.3d at 1295-96; Youmans, 729 F.2d at 415. The Court should consider the:

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[12] Indeed, on June 18, 2002, Jody Madron (a writer for Pirate) emailed Stansberry that he overheard a man in an airport line discussing USEC, saying:

> Yeah, but I don't know if the price will go up because a bunch of Internet assholes drove it up a few weeks ago before everything could fall into place . . . some idiot named McDaniel . . . yeah, I saved all of the emails . . . bunch of assholes who shouldn't be shooting their mouths off.

Pl.'s Ex. 62. In response to Madron's e-mail, Stansberry wrote: Bro . . . . that's fucking unbelievable. I would have walked right up to the guy and said, yep, that was me and then laughed in his face. Id. (punctuation in original).

1. Gravity of the harm caused by the offense;

2. Extent of the defendant's participation and his degree of scienter;

3. Isolated or recurrent nature of the infraction;

4. Likelihood that the defendant's customary business activities might again involve him in such transactions;

5. Defendant's recognition of his own culpability; and Sincerity of his assurances against future violations.

Fehn, 97 F.3d at 1295-96; Youmans, 729 F.2d at 415; SEC v. Suter, 732 F.2d 1294, 1301 (7th Cir. 1984); see SEC v. Holschuh, 694, F.2d 130, 144 (7th Cir. 1982); SEC v. Zale Corp., 605 F.2d 718, 720 (5th Cir. 1981). Because "an injunction is a drastic remedy and not a mild prophylactic," the SEC must meet a high burden to obtain an injunction. Aaron v. SEC, 446 U.S. 680, 703 (1980) (Burger, C.J., concurring).

a. The Gravity of the Harm

The gravity of the harm in this case is not limited to the amount of money each purchaser spent for the Special Report. Approximately 1,217 investors bought the Special Report with the expectation, as promised by the Super Insider Solicitation, that they would double their investment dollars if they just

followed the "insider" information contained within the Special Report.

At least one investor lost approximately 20 to 25% of his investment portfolio after purchasing USEC stock and options between May 13 and 22. See Trial Tr. 8-9, Mar. 24, 2005. That investor finally sold his stock, after May 22 came and went without the anticipated announcement, in August of 2002 when Stansberry indicated in a new special report to investors that USEC stock was no longer a good long-term investment. Id. at 9; see also Pl.'s Ex. 24.[13] The investor lost about $28,000. Trial Tr. 9, Mar. 24, 2005. Although the investor eventually received a refund of the $1,000 Special Report purchase price, that refund was not offered to him by Defendants. Rather, he learned that other purchasers of the Special Report had been offered refunds after reading about the SEC action against Defendants on the Internet. It was then that he contacted Pirate and requested and received a refund of the $1,000 purchase price. Id. at 10.

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[13] To be sure, Stansberry also advised in an August 1, 2002 special report that those who already owned USEC shares should hold them until the end of the year, but cautioned that his recommendation would be to sell any USEC stocks held at the end of the year if certain events did not materialize. Given Stansberry's poor track record on predicting events that would favorably impact USEC's stock, it is not surprising that investors jumped ship after receiving Stansberry's poor long-term prognosis for the stock.

Another investor who purchased the USEC Report for $1,000 testified that he sold other investments and borrowed money on a credit card in order to purchase 7,500 shares of USEC stock with the expectation that he would double his money after May 22. Id. at 26. That investor lost approximately $7,200 when he eventually sold the stock, two months after the approval of the new pricing agreement was supposed to have been announced. Id. He was never offered a refund of the purchase price of the USEC Report. Id. at 29. Although that investor tried on a number of occasions to get answers to specific questions about the status of USEC stock and the non-existent May 22 announcement, Stansberry merely responded that he could not give individualized investment advice. Trial Tr. 28, Mar. 24, 2005.

Investors certainly lost more than the $1,000 purchase price of the USEC Report. While Defendants reaped approximately $1 million in revenue from the sale of 1,217 copies of the Special Report, the losses to investors no doubt greatly exceeded that amount.

b. Degree of Participation and Scienter

Both Stansberry and Pirate were integral participants in the fraudulent scheme. Indeed, their culpability and participation are intertwined. Though Stansberry fabricated the false statements, Pirate also had a high level of participation in the communication of the false statements. Defendants targeted potential purchasers of the Special Report

through the Pirate database. It was a Pirate email that advertised the Special Report, and both the Super Insider Solicitation and the Special Report were ascribed to a commonly-used Pirate pseudonym, "Jay McDaniel." Stansberry testified at trial that he bears the ultimate responsibility for Pirate publications – "there's no doubt about it, I run the show." Trial Tr. 169, Mar. 22, 2005. Insofar as the Court has found that Stansberry acted with scienter because he knew that the statements he attributed to USEC were false, the scienter element is established.

c. The Isolated or Recurrent Nature of the Infraction

Since the USEC Special Report was issued in May of 2002, Pirate has issued many other "special reports." Trial Tr. 173, Mar. 30, 2005. Stansberry testified that one such report, which he authored, sold for $250 in 2003 and another that he authored with assistance of others in 2004 was free with a subscription to Stansberry's newsletter. Id. at 183. There is no evidence that there was another fraudulent scheme, however.

d. Defendants' Likely Involvement in Future Transactions

Defendants continue to distribute investment newsletters offering stock tips and advice.

e. Defendants' Recognition of Culpability

The Court does not, of course, fault the defense for raising the legal contentions presented in the instant case. However, the Court does not find that Stansberry recognizes his factual culpability and, indeed, finds that he testified falsely at trial.

f. Sincerity of Defendants' Assurances Against Future Violations

Defendants have not admitted the current fraudulent scheme. If Stansberry were to provide an assurance, that there would be no future violations, the Court would not find him particularly credible. The existence of an injunction against future fraudulent schemes of the type involved here will provide a needed measure of security against recidivism.

The Court finds, after weighing the relevant factors, that there is ample evidence of a "reasonable and substantial likelihood" that Defendants will violate securities laws in the future, absent an injunction. See Am. Realty Trust, 429 F. Supp. at 1175. Therefore, the Court shall enjoin Stansberry and Pirate from future violations of the securities laws or regulations by the SEC.

2. Disgorgement

The Commission has requested that the Defendants be ordered to disgorge their gains as a

result of their fraudulent activity. Disgorgement is appropriate when a district court has found a violation of the securities laws, so that the defendant must relinquish the unjust enrichment of his illegal activities. See, e.g. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95-96 (2d Cir. 1978).

The disgorgement amount "need only be a reasonable approximation of the profits casually connected to the violation." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996). In the instant case, it does not appear that there was any substantial marginal cost to Stansberry or Pirate attributable to the receipts generated from the sales of the Special Report. Accordingly, the receipts from the sale of the Special Report, net of refunds paid, would fairly approximate the profit "causally connected to the violation."

Pirate sold 1,217 copies of the Special Report at $1,000 per report, and reimbursed 215 purchasers of the Special Report, refunding a total of $215,000. Thus, Pirate's net receipts for the sale was $1,002,000.[14] Stansberry testified that he received a commission from Pirate for the Special Report sale in

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[14] Although Pirate also offered purchasers of the Special Report who did not request a refund a complimentary subscription to its Extreme Value newsletter (a $1,000 value), the Court does not find that this offer actually cost Pirate anything or diminished the profit on the Special Report. Accordingly, the cost of the Extreme Value newsletter for 395 Special Report purchasers does not reduce Pirate's profit from sales of the Special Report.

the amount of $200,400. Trial Tr. 172-73, Mar. 22, 2005. Therefore, the profit "causally connected to the violation" was $200,400 for Stansberry and $801,600 for Pirate.

It is within the Court's discretion to hold wrongdoers joint and severally liable in securities cases when "two or more individuals or entities collaborate or have close relationships in engaging in the illegal conduct." SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d Cir. 1997); see First Jersey Sec., Inc., 101 F.3d at 1475.

In the instant case, the Court finds it appropriate to hold Stansberry and Pirate jointly and severally liable for disgorgement of the entire amount of $1,002,000.

Stansberry testified that he ran "the show" and was the "person in charge" or Pirate. Trial Tr. 169, 171, Mar. 22, 2005. Stansberry and Pirate were was intimately involved in perpetrating the fraud at issue. Stansberry drafted the Super Insider Solicitation using a Pirate author's pseudonym, utilized Pirate's mailing list and newsletter, had sales of the Special Report, had Pirate receive the proceeds and keep the majority for itself. Furthermore, Stansberry testified that he received a bonus that was a percentage of Pirate's net income, and that in 2002, the year of this fraud, he "made substantially more." Id. at 169. He was unable to recall his specific bonus in 2002, estimating that it ranged from between $200,000 and $400,000.

Stansberry profited handsomely from Pirate's gain from the fraudulent scheme. Accordingly, the Court concludes that Stansberry and Pirate; therefore are to be jointly and severally liable for the entire $1,002,000 to be disgorged.

The Court finds it appropriate to exercise its discretion to award prejudgment interest with regard to the disgorgement. See Imgarten v. Bellboy Corp., 383 F. Supp. 2d 825, 846-47 (D. Md. 2005). The Court will borrow from Maryland law to fix the rate for prejudgment interest at 6% (simple) per annum. First Va. Bank v. Settles, 588 A.2d 803, 808 (Md. 1991). Prejudgment interest shall commence on May 21, 2002[15] and shall be calculated through July 21, 2007, the end of the last full month prior to the entry of Judgement. Thus, there shall be prejudgment interest of 6% per annum (simple) for five years and two months, that is, 62 months at .5% per month for a total of 31%.

Accordingly, with regard to disgorgement, Defendants Stansberry and Pirate are jointly and severally liable to pay the Clerk of Court the sum of $1,312,620[16] for disbursement pursuant to further Order.

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[15] The last day on which the Special Report could have been sold.

[16] Consisting of principal of $1,002,000 and prejudgment interest of $310,620.

3. Civil Penalty

The Commission has requested a third-tier civil monetary penalty be assessed against Defendants under 15 U.S.C. § 78u(d) (3) (B) (iii). Such a penalty is appropriate where violations involve: 1) "fraud, deceit, manipulation, or deliberate and reckless disregard of regulatory requirements"; and 2) the violation "resulted in substantial losses or created a significant risk of substantial loss to other persons." Id. For a third-tier penalty, the Court may assess up to $120,000 for each violation by an individual and $600,000 for each violation by an entity. Id.; 17 C.F.R. § 201.1002 (inflationary adjustment raising maximum penalty to $120,000).

Stansberry's conduct undoubtedly involved deliberate fraud, making statements that he knew to be false; Pirate acted in reckless disregard of regulations when it published Stansberry's unbelievable claims without a shred of confirmation. The violation plainly involved the risk of substantial loss to those who bought the Special Report and relied upon Stansberry's false statements in their stock purchase decisions.

The Court finds it appropriate to impose on Stansberry the maximum civil penalty, $120,000. As to Pirate, the Court finds that the SEC has not proven that any individual associated with the entity, other than Stansberry, had actual knowledge of the fraudulent scheme. Nor is there evidence that Pirate engaged in a pattern of fraudulent activity. Accordingly, the Court finds it appropriate to limit the civil penalty imposed on Pirate to $120,000 in

recognition of the fact that its culpability is based primarily upon the intentional conduct of one individual albeit aided and abetted by others.

III. CONCLUSION

For the foregoing reasons:

A. The Court finds that Plaintiff Securities and Exchange Commission has proven by clear and convincing evidence that Defendants Pirate Investor, LLC and Frank Porter Stansberry violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

B. The Court finds that Plaintiff Securities and Exchange Commission has not proven that Defendant Agora, Inc. itself (as distinct from its subsidiary) violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240. 10b-5.

C. The Court concludes that:

1. Defendants Pirate Investor, LLC and Frank Porter Stansberry are jointly and severally liable to pay the Clerk of Court the sum of $1,312,620 as disgorgement of profits.

2. A penalty be assessed under 15 U.S.C. § 78u(d) (3) (B) (iii) against Defendant Pirate Investor, LLC in the amount of $120,000.

3. A penalty be assessed under 15 U.S.C. § 78u(d) (3) (B) (iii) against Defendant Frank Porter Stansberry in the amount of $120,000.

6. Judgment shall be entered by separate Order.

SO DECIDED, on Wednesday, August 1, 2007.

s / Marvin J. Garbis
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

MEMORANDUM AND ORDER

The Court has before it Plaintiff's Motion for Entry of Amended Final Judgment [Paper 119] and the materials submitted relating thereto. The Court finds a hearing unnecessary.

For the reasons stated in the Memorandum of Decision [Document 116], the Court on August 1, 2007, issued a Judgment Order [Document 117] finding that Defendants Pirate Investor, LLC

("Pirate") and Frank Porter Stansberry[1] ("Stansberry") had violated Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

Plaintiff has filed the instant motion seeking an Amended Judgment to address "any challenge Defendants may have to the overbreadth of the [original] injunction." Pl.'s Mem. Supp. Mot. For Entry of Amended Judgment at 1 (citing SEC v. Washington Investment Network, 475 F.3d 392 (D.C. Cir. 2007) (striking down a similar injunction to the one in the Court's Judgment Order)). In view of the fact that both sides sought modification – albeit in different ways – the Court has rescinded the Judgment Order and now issues an Amended Judgment Order and permanent Injunction.

Defendants contend that any injunction[2] must be narrowly drafted to cover only "solicitations for one-time, special reports that are not 'general and regular' as the court has interpreted that term." Defs.' Opp. at 2. Anything broader, it is claimed, would unjustifiably cover publications entitled to substantial First Amendment protections.

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[1] The term "Defendants" herein refers to Pirate and Stansberry, unless otherwise indicated.

[2] Defendants' argument that no injunction at all should be issued has been considered and rejected. See Memorandum of Decision [Document 116] at Part III.F.1.

The Court has decided to accept Plaintiff's proposed injunctive language essentially adopting the language of the rule violated by Defendants, but only to the extent allowed under SEC v. Savoy, 665 F.2d 1310 (D.C. Cir. 1981). In Savoy, the District of Columbia Circuit affirmed an injunction proposed by the SEC proposal except for a clause enjoining the defendant from violation of Rule 10b-5 by engaging "in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person." The Court reversed this clause because:

> [t]o allow this provision to stand could subject to the federal civil contempt power future acts by [the defendant] that may be completely unrelated to his lawbreaking in the past. In short, this part of the injunctive order is in our view so vague as to put the whole conduct of [the defendant's] business at the peril of a summons for contempt.

Id. at 1318-19 (internal quotations omitted). The language struck in Savoy is identical to the final clause of the SEC proposal in the instant case. Accordingly, the Court will utilize all but the final clause of the SEC proposal. See McComb v. Jacksonville Paper Co., 336 U.S. 187, 192 (1949) (upholding an injunction which "[b]y its terms . . . enjoined any practices which were violations of . . . statutory provisions" and finding that "[d]ecrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown").

Finally, the Court notes Defendants' First Amendment contentions. However, the Permanent Injunction issued herewith enjoins Defendants from violating Rule 10b-5 but does not eliminate or reduce any available First Amendment protection. In determining whether any future 10b-5 violation has occurred, the communication at issue will be given all First Amendment protection to which it is entitled based on its content and character – not its title. Regardless of a communication's label (i.e., "regular publication" or "solicitations for one-time, special reports"), if the communication contains "pure speech" protected under New York Times v. Sullivan, 376 U.S. 254 (1964), it will receive the corresponding level of protection. If, however, the communication is of a character such as the publication in this case – a mere advertisement or purely commercial speech – then it will receive only "[t]he protection available for particular commercial expression[, which] turns on the nature both of the expression and of the governmental interests served by its regulation." Cent. Hudson v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980). Compare Alberti v. Cruise, 383 F.2d 268, 272 (4th Cir. 1967) (voiding an injunction enjoining the plaintiff from, among other things "contacting" the defendant as "clearly a prior restraint upon [the plaintiff]'s rights of freedom of speech...").

The "bottom line" is that the Permanent Injunction will not affect the extent of First Amendment protection available to any communication at issue.

CONCLUSION

For the foregoing reasons:

1. Plaintiff's Motion for Entry of Amended Final Judgment [Document 119] is GRANTED IN PART.

2. An Amended Judge Order and Permanent Injunction shall be issued herewith.

SO ORDERED, on Tuesday, October 2, 2007.

s / Marvin J. Garbis
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

AMENDED JUDGMENT ORDER

The Court has issued its Memorandum of Decision [Document 116] and issued a Judgment Order [Document 117] on August 1, 2007 and has, this date, granted in part Plaintiff's Motion for Entry of Amended Final Judgment [Document 119].

In accordance with said actions:

1. Judgment shall be, and hereby is, entered in favor of Plaintiff Securities and Exchange Commission against Defendants Pirate Investor, LLC and Frank Porter Stansberry for violations

of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

2. Judgment shall be, and hereby is, entered in favor of Defendant Agora, Inc. against Plaintiff Securities and Exchange Commission on the charged violations of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

3. A Permanent Injunction enjoining Defendants Pirate Investor, LLC and Frank Porter Stansberry from actions specified therein shall be issued by separate Order herewith.

4. Defendant Pirate Investor, LLC and Defendant Frank Porter Stansberry are jointly and severally liable for disgorgement of $1,002,000, representing profits gained as a result of the conduct alleged in the Complaint, together with prejudgment interest thereon in the amount of $310,620.00, for a total of $1,312,620.00 with judgment interest thereon.

   a. The said Defendants shall pay the aforesaid sum to the Clerk of the Court.

b. The Clerk shall deposit the funds into an interest bearing account with the Court Registry Investment System ("CRIS") or any other type of interest bearing account that is utilized by the Court.

c. These funds, together with any interest and income earned thereon (collectively, the "Fund"), shall be held by the Clerk pending further Order.

d. The Court shall consider the parties' respective positions as to the distribution of said funds to be submitted upon the expiration of time for an appeal from the instant Amended Judgment or any appellate decision thereon.

5. Defendant Pirate Investor, LLC shall pay Plaintiff a civil penalty in the amount of $120,000 pursuant to 15 U.S.C. §78u(d) (3) (B) (iii) plus judgment interest thereon.

6. Defendant Frank Porter Stansberry shall pay Plaintiff a civil penalty in the amount of $120,000 pursuant to 15 U.S.C. §78u(d) (3) (B) (iii) plus judgment interest thereon.

7. Defendant Pirate Investor, LLC and Defendant Frank Porter Stansberry[1] shall pay all assessable costs of this action.

8. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED, on Tuesday, October 2, 2007.

s / Marvin J. Garbis
United States District Judge

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[1] The said Defendants are jointly and severally liable for assessable costs.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES
SECURITIES AND
EXCHANGE
COMMISSION

Plaintiff

CIVIL ACTION NO.
MJG-03-1042

vs.

AGORA, INC., et al.

Defendants

* * * * *

PERMANENT INJUNCTION

For reasons stated in the Memorandum of Decision [Document 116] and in accordance with the Amended Judgment issued herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants Pirate Investor, LLC and Frank Porter Stansberry, their agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this Permanent Injunction by personal service or otherwise are permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange

Act of 1934 (the "Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C. F. R. § 240.10b-5], by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security:

1. To employ any device, scheme, or artifice to defraud; or

2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

SO ORDERED, on Tuesday, October 2, 2007.

s / Marvin J. Garbis
United States District Judge

Appendix F

IN THE COURT OF APPEALS
OF MARYLAND

No. 128

September Term, 2003

MELANIE SENTER LUBIN, SECURITIES COMMISSIONER FOR THE STATE OF MARYLAND

v.

AGORA, INC.

Bell, C.J.
Raker
Cathell
Harrell
Battaglia
Greene
Eldridge, John C.
(Retired, specially assigned)
JJ.

Opinion by Raker, J.

Filed: September 12, 2005

Julie L. Tewey (J. Joseph Curran, Jr., Attorney General of Maryland, on brief for Appellant)

Lee T. Ellis, Jr. (Bruce W. Sanford, Bruce D. Brown of Baker & Hostetler LLP, Washington, DC; Matthew J. Turner, General Counsel, Agora, Inc., Baltimore, Maryland, on brief for Appellee)

Pursuant to an investigation into potential violations of Maryland securities laws, appellant, the Maryland Securities Commissioner, served two subpoenas duces tecum on appellee, Agora, Inc., a company whose business includes publishing investment newsletters. Following Agora's refusal to produce its subscriber lists, marketing lists, and other documents containing information identifying any of its subscribers, the Commissioner filed a motion to compel enforcement. The trial court denied the motion, concluding that the Commissioner had failed to demonstrate a compelling need for the subscriber lists as required by the First Amendment and that the demand for subscriber lists was overbroad. We must decide whether the First Amendment to the United States Constitution prevents the Commissioner from compelling discovery of the identities of Agora's subscribers. We shall hold that it does.

I.

Agora is a Maryland corporation that publishes books and newsletters on topics such as investment, travel, leisure, and health. In the investment newsletter market, it fields more than a dozen offerings, with such colorful titles as "Pirate Investor," "Contrarian Speculator," and "The Flying

V Lockup Trader." It also operates an investors' group known as "The Oxford Club," which offers its members a variety of benefits, including a twice-monthly newsletter, internet advisories, meetings and seminars, a telephone hotline, and use of a club room at Agora's headquarters in Baltimore.

The Commissioner heads the Maryland Division of Securities (the "Division"), an administrative agency charged with enforcement of the Maryland Securities Act, Maryland Code (1975, 1999 Repl. Vol., 2004 Cum. Supp.) § 11-101 *et seq.* of the Corporations and Associations Article,[1] including the regulation of investment advisers and broker-dealers and the offer and sale of securities.

The Division commenced an investigation of Agora based on two activities undertaken by Agora. First, Agora sent a May, 2002 mass email ("the Email") to an indeterminate number of its own subscribers, and to other individuals drawn from commercially-available marketing lists.[2] The Email

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[1] Unless otherwise indicated, all future statutory references shall be to the Corporations and Associations Article of Maryland Code (1975, 1999 Repl. Vol, 2004 Cum. Supp.).

[2] The number and identities of the persons to whom Agora sent the Email are unknown to this Court, because this information is among that sought by the Commissioner and withheld by Agora. In its brief before this Court, however, Agora notes that the Email "was distributed to readers of well over a dozen Agora financial newsletters," and that a demand for a list of recipients equated to "a demand for a list of virtually all of Agora's investment newsletter subscribers." For purposes of this opinion, we will assume that at least some of the recipients of

offered a four-page report ("the Report") on an unnamed company, in which investors were promised they would "make a fortune." According to the Email, one of Agora's newsletter columnists had received "insider information" that a nuclear arms reduction treaty between the United States and Russia would be signed on a specific date and would create enormous profits for the unnamed company. The Email advised that investors could "double or even triple" their money by purchasing stock in the unnamed company on May 21, 2002, and selling two days later, after the public announcement of the international agreement. The name of this company would be revealed only to those who purchased the report, which was priced at $1,000.

How many copies of the report were transacted is unclear, but at least one person filed a complaint with the Division after he purchased the report, followed its advice to invest in United States Enrichment Corporation, Inc. ("USEC"), and lost money when the stock's price declined.

The second activity that interests the Division is Agora' s operation of the Oxford Club. In particular, the Division was concerned about a venture known as the "Oxford Club-Chairman's Circle," which, according to a direct-mail advertisement, featured "[l]ifetime access" to annual "private teleconference[s]

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the Email were subscribers to Agora publications, and that at least some of the recipients were not subscribers to Agora publications.

covering the issues most critical to our small group .. . the world's most knowledgeable experts to walk us through important strategies . . . a Chairman's Circle private researcher . . . to help you find specific information concerning a certain stock, offshore investments, global banking, real estate or any other issue concerning investing and wealth protection," as well as the "private numbers" of the Oxford Club's Executive Director, Research Director, and members of its Investment Advisory Panel. The price to join the Chairman's Circle was $5,000, and additional sums were due annually.

The Commissioner is investigating whether these activities violate Maryland securities law. First, she alleges that the Email or Report could violate the antifraud provisions codified at §§ 11-301 and 11-302 of the Securities Act.[3] Second, the Commissioner

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[3] Section 11-301 of the Securities Act makes it unlawful for:

"any person, in connection with the offer, sale or purchase of any security, directly or indirectly to: (1) Employ any device, scheme, or artifice to defraud; (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person."

Section 11-302 of the Securities Act makes it unlawful for:

"any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under § 11-

alleges that the activities of the Oxford Club (and possibly the Email and Report) could constitute individualized investment advice and thus subject Agora to the registration requirements of § 11-401.[4]

101(h) and (i) of this title, whether through the issuance of analyses, reports, or otherwise, to: (1) Employ any device, scheme, or artifice to defraud the other person; (2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on the other person; (3) Engage in dishonest or unethical practices as the Commissioner may define by rule."

[4] Section 11-101(h) of the Securities Act defines an investment adviser as:

"[A] person who, for compensation . . . [e]ngages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities .. . or [p]rovides or offers to provide, directly or indirectly, financial and investment counseling or advice, on a group or individual basis."

Section 11-101(h)(2)(v) excludes from the definition of an investment adviser:

"[a] publisher of any bona fide newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client."

(Agora is not registered in Maryland as an investment advisor.) The Commissioner's concerns in this regard are not limited strictly to the Oxford Club; she suspects that Agora may be offering individualized investment advice in other contexts. Third, the Commissioner alleges that Agora may have referred customers to specific brokerages for specific trades, possibly including the USEC matter, thus acting as an "introducing broker" and subjecting it to the broker-dealer registration requirements of § 11-401.[5] (Agora is not registered in Maryland as a broker-dealer.)

In furtherance of her investigation, the Commissioner issued two subpoenas duces tecum

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Section 11-401(b) provides, in relevant part:

"[a] person may not transact business in this State as an investment adviser or as an investment adviser representative unless:

(I) The person is registered as an investment adviser or an investment adviser representative under this subtitle"

(The statute provides certain exemptions not applicable here.)

[5] Section 11-101(c) defines a broker-dealer as "a person engaged in the business of effecting transactions in securities for the account of others or for his own account." Certain exemptions from this definition are provided, but are not applicable here. Section 11-401(a) states that "[a] person may not transact business in this State as a broker-dealer or agent unless the person is registered under this subtitle."

pursuant to her power under § 11-701(b). In the June 26 subpoena, she demanded, *inter alia*,

> "4. Information regarding the circulation of The Oxford Club newsletter.
>
> 5. Information regarding the circulation of each of the following newsletters: [seventeen newsletters named.]
>
> * * *
>
> 10. Identifying information as to all persons and newsletter subscribers to whom the Tip [i.e. the Email] was electronically mailed or otherwise sent, including name, address, email address and telephone number, or all documents containing that information. For newsletter subscribers, please show which newsletters are subscribed to.
>
> 11. Identifying information for all persons and newsletter subscribers who purchased the Tip [i.e. the Report], including name, address, email address and telephone number, or all documents containing that information. For newsletter subscribers, please show which newsletters are subscribed to.
>
> * * *
>
> 14. All complaints or inquiries (including written, electronic and

> summaries of verbal complaints or inquiries) regarding the Tip or USEC Inc.
>
> 15. All correspondence regarding the Tip or USEC Inc."

In the March 31,2003 subpoena, the Commissioner demanded, inter alia,

> "28. Client files relating to the "Members Liaison" and "Telephone Hotline" referred to at p.7 of Exhibit E, including notes, memoranda and correspondence generated in connection with Oxford Club members' inquiries, including that with respect to member representatives and clients.
>
> 30. All complaints, including written complaints or synopses of verbal complaints, generated in connection with Exhibits A through E [Agora advertisements]."

Although Agora complied with the remainder of the subpoenas, it did not comply, or at least did not comply fully, with the items listed supra.

In March 2003, the Commissioner informally narrowed her request for subscriber identifying information with respect to Items 10 and 11 of the June 2002 subpoena, demanding that Agora produce identifying information for Maryland subscribers

only. Agora refused consistently to produce any information identifying any of its subscribers.

The Commissioner filed a complaint against Agora, amended in May 2003, in the Circuit Court for Baltimore City, for refusing to comply with the Division's June 2002 and March 2003 subpoenas, and moved for enforcement of the subpoenas. Agora admitted that it had not produced all the information demanded, but raised as an affirmative defense the protections of the First Amendment to the United States Constitution and Article 40 of the Maryland Declaration of Rights. The Circuit Court held a hearing as to whether the subpoena should be enforced. Before that court, the Securities Commissioner made clear to the court, and Agora agreed,[6] that the only issue before the court was the Commissioner's request to the court to enforce the subpoena for the subscriber list.

The Circuit Court for Baltimore County denied enforcement of the subpoenas. The court reasoned as follows:

> "I do not believe that in our Bill of Rights that there is any provision that has higher priority than the First Amendment, and I think courts must be

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[6] Agora advised the court at the hearing to enforce the subpoena, and before this Court at oral argument, that everything had been supplied to the State, with the exception of the subscriber lists. The State did not controvert this representation.

very zealous in guarding that most fundamental of all rights and not allow any erosion thereof.

And I do believe that what the Commissioner is attempting to do here is, in its own relatively small way, an attempt to erode the fundamental principle. I do not believe that the Commissioner has made out any compelling showing why Agora, Inc., must release its subscriber list..

In counsel's opening argument, she said it would be very helpful, and perhaps it would be. And even assuming it would be, that doesn't win the ball game. That's not what the Commissioner has to show. Counsel has argued it would be very useful to us. More than once, she said it would be very useful to us to show what the actions of Agora may have been.

Counsel has argued that by seeing these subscriber lists it may implicate Agora by talking to the subscribers, a fishing expedition is what this is called. You know, we'd like to talk to subscribers and maybe we'll find something to implicate Agora. Maybe so. Maybe you would, but that is no basis for this.

There is no attempt to zero in on certain subscribers or a certain class of

subscribers, but all subscribers. Not that a narrowing of the list would be permissible either, but at least we're not at that point. It's a shotgun approach.

Counsel has argued, well it's relevant to the inquiry. Well, a million things can be relevant to an inquiry. And particularly when you are beginning an inquiry, one never knows what might be relevant. And to simply say to the Court well, this is relevant to an inquiry, which means a very broad-based pursuit, looking for whatever you might be able to find, that's not enough.

I think there are other avenues that might well be available to the Commissioner to obtain the identity of certain subscribers, be able to talk to certain subscribers. There is no showing there at all that that would not be possible. There is no showing here at all that the Commissioner has made any concentrated effort to speak to subscribers, locate them, get the information which the Commissioner is seeking.

And the fact that counsel has stated, well, it's been narrowed down to Maryland subscribers is of no moment. I think it is definitely over broad.

> As I've indicated, if it were particularized to a certain group of subscribers only, I'm not sure whether that would remedy it either. But we don't have that situation. We have the situation here of all the subscribers in the State of Maryland. It is for these reasons that the Commissioner's motion is denied."

The Commissioner noted a timely appeal to the Court of Special Appeals. Before consideration by that court, we issued a writ of certiorari on our own initiative. *Securities Commissioner v. Agora*, 380 Md. 230, 844 A.2d 427 (2004).

II.

The Commissioner argues that the Circuit Court erred in its determination that First Amendment interests are implicated by the subpoenas and, therefore, failed to apply the proper test for enforcement of administrative subpoenas. The Commissioner argues that the subpoenas satisfy the three-part test articulated by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09, 66 S. Ct. 494, 505-06, 90 L. Ed. 614 (1946), and recognized by this Court in *Banach v. State Commission on Human Relations*, 277 Md. 502, 506, 356 A.2d 242, 245-46 (1976), for enforcement of an administrative agency subpoena: (1) "the inquiry is authorized by statute;" (2) "the information sought is relevant to the inquiry;" and (3) "the demand is not too indefinite or overbroad." *See also State*

Commission v. Freedom Express, 375 Md. 2, 12, 825 A.2d 354, 360 (2003).

The Commissioner asserts that the information sought is relevant to the investigation, which is authorized by statute, because having access to such information would allow the Division to investigate thoroughly whether Agora has violated provisions of the Securities Act, including §§ 11-301 and 11-302 (antifraud provisions), and § 11-401 (broker-dealer and investment adviser registration requirements). Speaking with subscribers and potential customers would allow the Commissioner to ascertain whether Agora transacted business as an investment adviser without registering as such in violation of § 11-401 by, for example, providing personalized investment advice at Agora-hosted conference calls and symposia. Having access to contact information for those persons who received the Email or purchased the Report also would enable the Commissioner to question those individuals about their dealings with Agora to determine whether Agora violated the Securities Act's antifraud provisions by, for example, communicating false or misleading information to investors in a nonpublished format. The Commissioner maintains that the subpoenas satisfy the third prong of the *Banach* test because the demands are sufficiently definite and reasonable in scope considering the purpose of the investigation, and compliance with the subpoenas would not be burdensome.

The Commissioner further contends that no legitimate First Amendment interest would be

implicated by enforcement of the subpoenas because the subpoenas do not restrict Agora's publishing activities in any way. The Commissioner claims that the subpoenas are enforceable because they were issued in connection with the Email, which she maintains is unprotected commercial speech because it is misleading and serves Agora's economic interests. Further, the Commissioner argues that the subpoenas do not implicate associational rights of Agora's subscribers because the Commissioner seeks subscriber identities only as a means of fulfilling her statutory duty to protect investors and not in an effort to learn more about their associational ties or political persuasions.

Agora argues that the First Amendment to the United States Constitution, Article 40 of the Maryland Declaration of Rights, and Maryland public policy promoting the free flow of information require a heightened level of review when an administrative subpoena seeks the disclosure of a publisher's subscriber lists. Instead of merely satisfying the *Banach* test, Agora argues, the Commissioner must show the relevancy of the information sought, a compelling need for the information, and proof that the State has no other available means of obtaining it. Claiming that it has standing to assert the constitutional rights of its subscribers, Agora also argues that the First Amendment associational rights of its readers trigger "exacting" scrutiny, as "probing questioning from regulators about their reading habits . . . will undoubtedly discourage these readers from maintaining their relationship with the publisher" and exercising their First Amendment

freedoms. *See Buckley v. Valeo*, 424 U.S. 1, 64, 96 S. Ct. 612, 656, 46 L. Ed. 2d 659 (1976) ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* [357 U.S. 449,78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)] we have required that the subordinating interests of the State must survive exacting scrutiny.")

Agora maintains that the Commissioner has failed to show a compelling need for subscriber lists and has not exhausted other avenues for investigating Agora's compliance with the Maryland Securities Act. First, Agora argues that the Division has no compelling need for subscriber lists in investigating whether Agora acted as an unregistered investment adviser in violation of § 11-401. Noting that the Commissioner has offered no evidence that Agora has provided personalized investment advice to its readers, Agora asserts that the subpoenas' "dragnet" for the identities of all subscribers cannot meet the heightened requirement of a compelling or overriding governmental need. Agora maintains that, in the context of the Division's inquiry into possible noncompliance with investment advisor provisions, there are alternatives to demanding subscriber lists. Such alternatives might include gathering information from a narrower group of individuals who participated in Agora seminars, conference calls, and telephone hotline services, or seeking information from Agora employees themselves regarding communications to subscribers.

Second, Agora maintains that there is no compelling or even relevant need for subscriber lists to investigate whether Agora violated antifraud provisions of Maryland securities laws. Even assuming that § 11-301 could provide a cause of action against Agora, which Agora maintains it could not,[7] Agora asserts that the text of its publications, along with its trading records, which it has produced, would suffice in determining whether it made any false or misleading statements "in connection with" the offer, sale, or purchase of securities. Further, Agora maintains that the Commissioner's desire to know the extent to which readers may have relied upon Agora's statements and suffered harm as a result cannot justify the demand for subscriber lists because reliance and damages are irrelevant to any action the Commissioner might bring against Agora under § 11-301. In sum, Agora argues that the Commissioner has made no compelling connection

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[7] Section 11-301 of the Maryland Securities Act makes it unlawful to make false or misleading statements "in connection with the offer, sale, or purchase of any security." Agora asserts that, as a mater of law, it cannot make a materially false statement "in connection with" the offer, sale, or purchase of any security because Agora merely publishes information about, and does not trade in, the stocks it recommends. *See SEC v. Wall Street Publ'g Inst.*, 664 F. Supp. 554, 556 (D.D.C. 1986), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988) (holding that statements in investment newsletters were not "in connection with" securities transactions merely because readers might rely on them in deciding whether to invest, and therefore § 10(b) of the Securities Exchange Act of 1934, the federal counterpart to § 11-301, is not applicable to the publisher of an investment newsletter).

between the subjects of the inquiry and the request for identifying information of Agora subscribers.

III.

We must determine whether the Commissioner legally may compel Agora to produce the subscriber lists. Ordinarily, administrative agency subpoenas will be enforced if the agency's investigation is statutorily authorized, the information sought by the subpoena is relevant to the investigation, and the demand is not indefinite or overbroad. *Banach v. St. Comm'n on Human Rel.*, 277 Md. 502, 506, 356 A.2d 242, 245-46 (1976). The First Amendment, however, creates "an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546, 83 S. Ct. 889, 893-949 L. Ed. 2d 929 (1963). We must examine the information sought by the Commissioner to determine whether to apply the ordinary *Banach* inquiry, or the much more exacting scrutiny required by the First Amendment. Having made that determination, we must then determine whether the applicable standard has been met.

The First Amendment to the United States Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech, or

of the press; or the right of the people peaceably to assemble."[8] The Supreme Court long has recognized that the freedoms of speech and the press protected by the First Amendment encompass much more than the right to speak, write, and publish. *See Griswold v. Connecticut*, 381 U. S. 479, 482, 85 S. Ct. 1678, 1680, 14 L. Ed. 2d 510 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.") Recognizing the interdependence between receipt of information, on the one hand, and expression of information on the other, the Court has stated:

> "This right [to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them . . .. More

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[8] Agora argues that the rights it asserts under the First Amendment are the same as the rights guaranteed by Article 40 of the Maryland Declaration of Rights. This Court often has interpreted Article 40 *in pari materia* with the First Amendment. *See State v. Brookins*, 380 Md. 345, 350 n.2, 844 A.2d 1162, 1165 n.2 (2004); *The Pack Shack, Inc., v. Howard County*, 377 Md. 55, 64 n.3, 832 A.2d 170, 176 n.3 (2003). As we stated in *The Pack Shack*, "[i]n light of the facts and arguments in the case at bar, . . . we shall regard the claimed violation of Article 40 and the claimed violation of the First Amendment as a single issue." *Id.* at 65 n.3, 832 A.2d at 176 n.3.

> importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."

Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 867, 102 S. Ct. 2799, 2808, 73 L. Ed. 2d 435 (1982) (emphasis in original).

The First Amendment protects broadly the rights of individuals to read and to receive ideas. First Amendment freedoms are implicated and infringed directly when the government denies access to or proscribes reading materials on the basis of the contents of those materials. *See, e.g., Id.* (holding that the First Amendment prohibits the government from removing books from the shelves of a school library based on the ideas contained in those books); *Stanley v. Georgia*, 394 U.S. 557, 559 89 S. Ct. 1243, 1245,22 L. Ed. 2d 542 (1969) (holding that a state statute criminalizing the mere possession of obscene materials in a person's home violates the First Amendment). The First Amendment is implicated also when regulations deter or interfere with the receipt of information and free flow of ideas.

In *United States v. Rumely*, 345 U.S. 41, 73 S. Ct. 543, 97 L. Ed. 770 (1953), the Supreme Court said of government inquiry into the identities of those who purchase or read certain materials:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all

> efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."

Id. at 46, 73 S.Ct. at 546.[9] Unlike the majority in that case, Justice Douglas would have reached the constitutional issue. His concurrence explains persuasively how freedom of expression is threatened by government inquiry into the identities of those who purchase or read certain materials:

> "A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press .... Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The

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[9] The majority in *Rumely* did not reach this constitutional issue because it concluded that the House of Representatives, in authorizing the Select Committee on Lobbying Activities to investigate "lobbying activities," had not conferred upon the committee the authority to inquire into matters such as the distribution of books and pamphlets to influence legislation indirectly. *Id.* at 47, 73 S. Ct. at 546.

> purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular . . . . The pres and its readers will pay a heavy price in harassment . . . . If [a book-buyer] can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land . . . . Congress could not do this by law. The power of investigation is also limited."

Id. at 57-58, 73 S. Ct. 543, 551-52 (Douglas, J., concurring).

The Supreme Court has condemned as unconstitutional the deterrent effect on speech that could arise if the government required readers to identify themselves before receiving through the mail certain reading material. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965). In *Lamont*, the Court struck down a postal regulation that required an addressee to file a written request with the post office before receiving "communist political propaganda." *Id.* at 307, 85 S. Ct. at 1496. The Court held that the requirement that readers of such material identify themselves before getting access to the material was "almost certain to have a deterrent effect." *Id.* The Court

stated that the postal regulation at issue was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *Id.* at 307, 85 S. Ct. at 1496- 97 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686 (1964). Although the Court did not hold explicitly that readers have a right to keep either their identities or the contents of what they read secret, *Lamont* at least suggests that the First Amendment protects a right to read anonymously, free from government monitoring or surveillance.

The Supreme Court has recognized that government inquiry into an individual's choice of associates may produce a chilling effect on exercise of the freedom of association protected by the First Amendment. Thus, an essential component of that freedom is a right of associational anonymity. *See generally NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). In *NAACP*, the Attorney General of Alabama filed suit in equity to enjoin the NAACP from conducting any activities in the state, alleging that the NAACP was a foreign corporation that had failed to qualify before doing business in the state. The State moved for the production of a large number of the NAACP's records and documents, including a list of the names and addresses of all Alabama members of the NAACP. The NAACP refused to produce its membership lists, contending that compelled disclosure abridged the constitutional rights of its members to engage in lawful association.

The Supreme Court held, as a threshold matter, that the NAACP had standing to assert the constitutional rights of its members because, if the members did possess the right to prevent release of their identities to the government, requiring the members to be parties to the litigation would nullify that right. *Id.* at 459, 78 S. Ct. at 1170. Underscoring the "vital relationship between freedom to associate and privacy in one's associations," *id.* at 462, 78 S. Ct. at 1172, the Court held that "immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466, 78 S. Ct. at 1174. Considering the physical threats, economic reprisals, and other displays of hostility faced by members whose identities had been revealed in the past, the Court stated that compelled disclosure of the NAACP's membership list entailed the likelihood of a "substantial restraint" upon the members' rights to associate freely. *Id.* at 462, 78 S. Ct. at 1172. Finally, concluding that disclosure of the names and addresses of the NAACP's members had no perceptible, substantial bearing on an inquiry into whether the organization had conducted business in the State or was required to comply with the registration statute, the Court held that the State of Alabama lacked an interest substantial enough to justify the likely deterrent effect of disclosure. *Id.* at 465-66, 78 S. Ct. at 1173-74.

Although the Supreme Court has not addressed squarely the issue of whether individuals have a

constitutionally protected right to read anonymously, the Court's First Amendment jurisprudence suggests that the government has no greater right to inquire into an individual's choice of reading materials than it does to inquire into an individual's choice of associates. Connecting the importance of privacy to the preservation of free speech, Justice Douglas opined that the First Amendment forbids the government from inquiring into the identities of persons who buy particular books or other printed materials. *Rumely*, 345 U.S. at 57-58, 73 S. Ct. at 551-52 (Douglas, J., concurring). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462, 73 S. Ct. at 1172 (citing *Rumely*, 345 U.S. at 57-58, 73 S. Ct. at 551-52 (Douglas, J., concurring)). In holding that the government may not criminalize the private possession of obscene materials, the Court in *Stanley* considered in tandem the "right to receive information and ideas, regardless of their social worth" and the "right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." *Stanley*, 394 U.S. at 564, 89 S. Ct. at 1247-48. The Court recognized that the appellant in that case was asserting broadly "the right to be free from state inquiry into the contents of his library." *Id.* at 565, 89 S. Ct. at 1248.

More recently, the Court struck down a provision of a federal statute that required cable system operators to segregate and block "patently offensive"

sex-related material appearing on leased channels and to unblock and reblock the channel only upon a subscriber's written request. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996). Disapproving of the written notice requirement, the Court stated that the requirement "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." *Id.* at 754, 116 S. Ct. at 2391.

The Supreme Court has recognized that the right to privacy of association and belief guaranteed by the First Amendment encompasses more than the right to be free from government inquiry into one's membership in organizations and the names of one's co-members. Addressing the First Amendment implications of disclosure requirements[10] in the Federal Election Campaign Act of 1971, the Court stated that "invasion of privacy and belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for 'financial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley v. Valeo*, 424 U.S.

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[10] The provisions at issue required, *inter alia*, that political committees and candidates file with the government reports containing the name, address, occupation, and principal place of business of any individual who contributed over $100.00 to the committee or candidate in a calendar year. *See* 2 U.S.C. § 431 *et seq.* (1970).

1, 66, 96 S. Ct. 612, 657, 46 L. Ed. 2d 659 (1976) (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79, 94 S. Ct. 1494, 1526, 39 L. Ed. 2d 812 (1974) (Powell, J., concurring)). Compelled disclosure of an individual's decision to read, purchase, or subscribe to certain publications may invade that individual's privacy of belief and association to just as great an extent.

To the extent that the Commissioner's subpoenas require Agora, a publisher, to disclose the identities of those who subscribe to or purchase its materials, the subpoenas seek information within the protective umbrella of the First Amendment. Enforcement of the subpoenas would intrude upon the First Amendment rights of Agora's subscribers and customers[11] because disclosure of their subscriber status and purchase of the Report would destroy the anonymity that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms. If the names of Agora's readers were disclosed to the government, they might be subjected to questioning from investigators about their reading habits. Agora's subscribers may be discouraged from reading its materials if they are interviewed by government personnel investigating potential securities violations, even if the readers are

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[11] The Commissioner has not argued that Agora does not have standing to assert the constitutional rights of its subscribers and customers. *Cf. Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 643, 98 L. Ed. 2d 782 (1988) (holding that booksellers had standing to allege an infringement of the First Amendment rights of bookbuyers).

told that, individually, they are not under investigation.

We do not accept the Commissioner's contention that Agora's subscribers enjoy a lower level of First Amendment protection because the Email or Report may have been "commercial speech," possibly even false commercial speech. Commercial speech enjoys a lower level of protection when it is true, and no protection at all when it is false or misleading. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Servo Comm'n of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980). But revealing the subscriber information would not only disclose that the subscribers had received the Email or Report; it would necessarily reveal that the subscribers had received other Agora publications. Even assuming *arguendo* that the Email and Report were commercial speech, there is no credible allegation that Agora's newsletters in general fit the Supreme Court's limited definition of that category, announced in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340, 106 S. Ct. 2968, 2976, 92 L. Ed. 2d 266 (1986) — "speech that does no more than propose a commercial transaction."

In order to compel production of the subscriber information, the Commissioner must therefore establish a substantial relation between the information sought and an overriding and compelling State interest. The Commissioner seeks the subscriber information in order to question subscribers whether Agora transmitted false and

misleading information in the Email, whether the subscribers had been witnesses or victims of other, unspecified acts of securities fraud by Agora, and whether they had ever been provided with brokerage services or individualized investment advice by Agora. Referring to Agora's subscribers, counsel for the Division stated at the hearing in the Circuit Court that "it would be very useful to us to be able to talk to those people." Although having access to lists of Agora's subscribers and customers might be helpful to the Commissioner in the context of the investigation, the Commissioner has not shown a compelling need for the subscriber information.

The Commissioner has failed to show a sufficient nexus between the investigation into whether Agora acted as an unregistered investment adviser, on the one hand, and the demand for a list of those subscribers who received the Email, on the other. The Commissioner has not alleged that the Email was individually tailored to the portfolios of individual recipients. The advertisements for the Oxford Club and other non-newsletter activities may suggest that, in the context of those activities, Agora engaged in conduct that constituted individual investment advice. But the Commissioner has not alleged that Agora provided individualized advice to newsletter subscribers. Likewise, no substantial nexus exists between the Commissioner's investigation into Agora's alleged unregistered brokerage activities and the indiscriminate demand for the identities of countless newsletter subscribers who possibly might have been offered such services.

The Commissioner also has failed to establish a nexus between the request for subscriber information and the investigation into whether Agora has engaged in fraud in connection with securities transactions. The question of whether the Email or other Agora advertisements and publications contain false or misleading statements may be resolved by examining the text of these communications; resolution of this question does not require a list of every person who received them.

The fact that the Commissioner might possibly ferret out additional instances of securities fraud by contacting essentially every subscriber to every Agora investment newsletter does not establish a sufficient nexus between that government interest and the wholesale disclosure of those subscribers' identities. Persons who believe that they have received false or misleading communications from Agora are entitled to contact the Division if they wish to; likewise they are entitled, under the First Amendment, to maintain their anonymity.

The Circuit Court characterized correctly the Division's desire for subscriber information as a "fishing expedition." Although access to this information might be useful to the Division's investigation, the State has not shown that it has any compelling need for its disclosure. Enforcement of this demand would "sacrifice First Amendment protections" for too "speculative a gain." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 127, 93 S. Ct. 2080, 2099, 36 L. Ed. 2d 772 (1973). Agora cannot be compelled to produce the subscriber information.

The purchaser information gives rise to a slightly thornier First Amendment question, because individuals who purchased the Report were not necessarily subscribers to Agora's regular publications, and thus may not share the freedom of association concerns attributable to subscribers. Nonetheless, we believe that the speech-specific principles articulated in *Griswold*, *Pico*, *Rumely*, *Stanley*, and *Lamont* give rise to a protection that shields the identities of those who purchase individual publications. The United States District Court for the District of Columbia addressed this issue when the Office of Independent Counsel issued subpoenas duces tecum to two bookstores in the Washington D.C. area, demanding specific titles of books purchased by White House intern Monica Lewinsky. *See In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Media L. Rptr. 1599 (D.D.C. 1998). Ms. Lewinsky alleged that her right to buy books had been chilled "for fear of intrusion and embarrassment." *Id.* at 1600. The bookstores claimed that enforcement of the subpoenas would burden not only their First Amendment rights to distribute reading materials, but also their customers' First Amendment rights to have access to such material. *Id.* The court concluded that the First Amendment was implicated by the subpoenas and that "the bookstores and Ms. Lewinsky have persuasively alleged a chilling effect on their First Amendment rights." *Id.*

The commercial speech doctrine does not diminish the protection that the First Amendment affords to the purchaser information. The "insider

information" contained within the Report may have been genuine; it may also have been fabricated. But so long as the Report did more than propose a commercial transaction between Agora and the purchasers, it was not solely "commercial speech," and its falsity would not diminish the purchasers' interests in anonymity.[12] *See Posadas de Puerto Rico*, 478 U.S. at 340, 106 S. Ct. at 2968. While the Report did urge its purchasers to engage in a commercial transaction, viz., investment in USEC stock, it did not propose that its readers should buy their shares from Agora.

We therefore consider the request for purchaser information under the standard for First Amendment-implicated subpoenas. Much as with the subscriber information, we conclude that the speculative value of the purchaser information does not outweigh the burden that compelled disclosure would place on the First Amendment interests of the individuals identified. Although it is possible that the Report contained false or misleading information, the Commissioner has the Report and can evaluate the statements made therein without requiring Agora to reveal the identities of the purchasers. The

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[12] We also question the Commissioner's underlying premise, *i.e.*, that readers of commercial/speech enjoy a lesser right to anonymity than readers of fully-protected speech. The commercial speech doctrine has developed in the context of government attempts to regulate speech itself, and appellant has cited no authority for the proposition that the doctrine gives rise to a symmetrical diminution in the right to read anonymously.

investigation into the Email and Report began with a complaint from a disgruntled purchaser, suggesting that such persons are capable of coming forward if they wish their identities known.[13]

The Commissioner raises the possibility that Agora might have provided brokerage services in connection with the Report—that certain purchasers could have placed their orders for USEC stock with brokers recommended by Agora or in which Agora owned a financial interest. The Commissioner provides no basis for this allegation, however, beyond the general suspicion that Agora may be providing unregistered brokerage services in other contexts, and her interpretation of some Agora advertising materials as "suggest[ing] that subscribers receive different levels of service depending on how much they are willing to spend." The Commissioner has nowhere indicated that the sole consumer complaint concerning the Report contained any allegation of offers by Agora to broker transactions in USEC stock. Thus, while learning the identities of those who

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[13] The record indicates that the purchaser in question traded USEC stock after receiving the Report. We therefore do not decide whether the Commissioner would have a compelling interest in learning purchaser identities if she had no other means of investigating investor reliance. Resolving this issue would require us to consider an underlying question of Maryland securities law: whether investor reliance must be proven in order to establish securities fraud under § 11-301. We shall not consider such an important issue of securities law, one not necessary to the decision in the instant case, which is not a prosecution or enforcement action under § 11-301, and one not briefed or argued.

purchased the Report would be useful in investigating whether those persons were offered brokerage services, the Commissioner's suspicions in this regard lack any meaningful foundation. Such speculation cannot form the basis for a substantial relation to a compelling state interest that would justify invading the First Amendment's sphere of protection over the purchasers' anonymity. Agora cannot be compelled to produce the purchaser information.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

Appendix G

FILED: NOVEMBER 13, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

—

No. 08-1037
(1:03-cv-01042-MJG)

—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee

v.

PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY,

Defendants - Appellants

and

AGORA, INCORPORATED,

Defendant

JAMES DALE DAVIDSON,

Intervenor/ Defendant

FORBES, LLC; HEARST CORPORATION; TRIBUNE COMPANY, (including the Baltimore Sun); EAGLE FINANCIAL, INCORPORATED; INVESTORPLACE MEDIA, LLC; AMERICAN SOCIETY OF NEWSPAPER EDITORS;

CALIFORNIA FIRST AMENDMENT COALITION; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amici Supporting Appellant

ORDER

The Court grants the motion for leave to file an amici curiae brief in support of the request for rehearing en banc and denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer and Judge Motz.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix H

FILED: DECEMBER 11, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

—

No. 08-1037
(1:03-cv-01042-MJG)

—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Plaintiff - Appellee

v.

PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY,

Defendants - Appellants

—

O R D E R

—

Upon consideration of Appellant's unopposed motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari, the Court grants the motion.

Entered at the direction of Judge Niemeyer and Judge Motz acting as a quorum pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Patricia S. Connor, Clerk

Appendix I

FILED: MARCH 12, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

—

No. 08-1037
(1:03-cv-01042-MJG)

—

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Plaintiff - Appellee
v.
PIRATE INVESTOR LLC; FRANK PORTER STANSBERRY,
Defendants - Appellants
and
AGORA, INCORPORATED,
Defendant
JAMES DALE DAVIDSON,
Intervenor/ Defendant

FORBES, LLC; HEARST CORPORATION; TRIBUNE COMPANY, (including the Baltimore Sun); EAGLE FINANCIAL, INCORPORATED; INVESTORPLACE MEDIA, LLC; AMERICAN SOCIETY OF NEWSPAPER EDITORS; CALIFORNIA FIRST AMENDMENT COALITION; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF

PROFESSIONAL JOURNALISTS; THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amici Supporting Appellant

ORDER

Upon consideration of the unopposed motion to extend the stay of mandate pending filing of petition for certiorari through March 26, 2010, the Court, for good cause shown, grants the motion.

Entered at the direction of Judge Niemeyer and Judge Motz, acting as a quorum pursuant to 28 U.S.C. §46(d).

For the Court

/s/ Patricia S. Connor, Clerk

Appendix J

DOUBLE YOUR MONEY ON MAY 22ND
WITH THIS *SUPER INSIDER* TIP

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Dear Investor,

I've recently learned the details of a major international agreement between the United States and Russia that will create more than $2.5 billion in profits for one small U.S. company.

Investors in this company are going to make a fortune – for reasons that I can detail for you here. And, best of all, because of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public.

The deal will close on May 22nd, only a few days from now. The company involved is publicly traded - on the New York Stock Exchange - and it's currently paying an 8% annual dividend. Although the company has a billion dollars in net assets, it has been forgotten by Wall Street and today it's valued for less than $600 million.

Meanwhile, reasonable projections see the upcoming deal adding at least $2.5 BILLION in profits to the company's bottomline. Although the market value of the stock could soar by four or five times (it's only a $7.00 stock), I'm conservatively estimating that the shares will double.

Let me show you why.

On May 23rd the United States and the Russian government will sign a new arms reduction agreement that will reduce the number of nuclear warheads around the world by around 10,000 Thousands of investors watching CNN or CNBC will see the ceremony, with all its pomp and circumstance, live from St, Petersburg, Russia. But only a handful of investors will have already profited on the behind-the-scenes-maneuvering that put one company in a position to make an outrageous profit on the new treaty.

If you follow politics closely, the upcoming U.S.-Russian summit probably isn't news to you. Details are already leaking out to the media. For example, on The Wall Street Journal's May 8th front-page: "the U.S. and Russia now appear on track to sign a nuclear arms reduction treaty at the-Bush-Putin summit." What you haven't read in the papers yet is how this deal will mean hundreds of millions of dollars in windfall profits for one company. In fact, on May 22nd - the day before the summit begins - shares in this stock should more than DOUBLE, as the new agreement with the Russians will mean fat profits through the year 2013. A high-level corporate executive - someone definitely in a position to know - passed along the details to me. He explained how the deal would benefit his company – raising its profit margins by 20 percentage points. He even told me the precise day the deal would be announced.

This is the kind of insider information that could make you a lot of money. And you won't have to risk

much either...

In fact, the company the question is already a terrific bargain. It's valued by the stock market for around HALF of net assets. It pays an 8% dividend annually. In each of the last four years it sold over a billion dollars worth of product. This year alone it will have over $150 million in cash flow thanks to excess inventory reductions. This is a profitable business, with or without a treaty with the Russians. Despite its assets, sales and terrific strategic position, the market values the entire company at less than $600 million because this is an "old-economy" stock.

In other words, you could probably DOUBLE your money on this stock as the stock market recovers - with or without the sweetheart deal the company has negotiated as part of the upcoming nuclear arms agreement. And, with the information I'm prepared to give you, you won't have to wait for the stock market to recover. This stock will probably double - and could even triple or more - on the news I know will be announced in a few days.

Make no mistake - my plan to double your money is extremely low risk. This is a billion dollar corporation (in sales) that's currently valued at less than $600 million and that pays an 8% annual dividend. I'm not even recommending the options on this stock - just the regular shares. If you can double your money in one day on a low risk speculation, why get greedy?

But, for just a moment, forget about the blue chip description, the 8% dividend, the Russian presidential summit - I'll fill in the details as we go.

Focus on doubling your investment dollar SAFELY on the back of an insider tip. I can even tell you exactly which day the pop in the stock should happen. Like I told you, it's a Wednesday later this month - May 22nd. The news will be all over CNN. The President of the United States will be involved. And one company - just one company - stands to gain at least $250 million in income each year for the foreseeable future (at least through 2013). Considering that the stock in question is only valued at $600 million today...well. I'm conservatively estimating that the stock will double. But it could certainly go up a lot more than that...

Again - this tip is for a single stock. It trades on the New York Stock Exchange. It pays an 8% dividend. It has a virtual monopoly on its business in the U.S. And I can tell you precisely when, why and how its shares should double later this month. Downside if I'm wrong? Most likely zero. After all, the stock is already trading at less than net assets and it's paying an 8% annual dividend. This could be the simplest, safest and easiest way you'll ever double or even triple your money. Ever. And I'm going to give you a summary of the opportunity, right here in this email.

HOW TO MAKE A LOT OF MONEY, WITHOUT RISKING ANY (HINT: POLITICS)

I'm sure you're wondering – how is it possible to double your money on a safe stock in one day? How can you double or triple your money – in less than a month – without buying speculative stock or stock options? How can you make a killing without putting much at risk?

In a word, politics.

That's right. Living in the greater Washington D.C. metropolitan area has its distinct advantages. Recessions never hit this part of the country because the government never stops growing. And. the insider tips you get at the country clubs here have nothing to do with something as risky as venture capital. Instead, I hear about the dirty, but sometimes very profitable, world of politics.

Maybe you haven't heard about it yet, but the upcoming U.S.-Russia summit is big news here in D.C. President Putin will host President Bush for three days in Russia. According to my source - and backed up by rumors that have been reported in the mainstream press - the major announcement of this summit will be an important new strategic alliance between the United States and Russia, relating to nuclear stockpiles and a new strategic defense system to protect both our countries from nuclear missiles...

The company I'm passing along to you will be a direct beneficiary of this agreement, to the tune of billions of dollars in profits.

See how this works? It's a total insider deal. Money and favors in exchange for a fat deal with the Russians. Hey, I know it's dirty. But I don't make the rules and I don't run the company or involve myself in politics. On the other hand, I see nothing wrong with profiting from my insider knowledge of this deal and I don't think you should be ashamed to do so either.

It's a great opportunity. Let me give you a few of the details now.

THE DETAILS YOU NEED TO MAKE A QUICK (AND HUGE) PROFIT

First, the company that will profit at the expense of the Russians is well known and (obviously) well connected.

In fact, the company was spun out of the U.S. government in 1993, which helps to explain why it has so much access to the government corporate welfare trough. Let me reiterate: this is a major company, not some penny stock. On the balance sheet you'll find over $200 million in cash and over $800 million in inventory (some of which was just liquidated for over $150 million). Net assets are valued at more than $950 million. But - get this - today the stock trades for less than $600 million - despite paying an 8% dividend this year.

This is a major company that sells a critically important commodity all over the world. It has had over a billion dollars in sales for the last four years and positive earnings per share each of the last four years too.

So...what's wrong with this picture? If this is such a great company, why is the stock so undervalued?

Because without the upcoming deal with the Russians and the support it gets from the U.S. government (protective tariffs), its costs match its sales revenue. In other words, this company - absent

its upcoming deal with the Russians - would probably only breakeven this year.

So...the market is a down on the company. But I know the deal with the Russians is about to go through...! Once the deal with the Russians goes through, the company's net margins should exceed 20% - netting it around $250 million per year, even if you assume its market doesn't grow at all!

And guess what? The deal with the Russians has ALREADY BEEN SIGNED. That's right. It's all done, locked up. Finished. The only thing that both sides are waiting on is the proper media event to announce this commercial cooperation between the Ruskies and us. It's a feel good thing. It's PR for the politicians. You know how the game works. The important work is done in advance. so that when the cameras are rolling, everything comes off without a hitch.

Who is my source? Well...I can't tell you, except to say that he is a senior executive inside the company. He is definitely in a position to know the intimate deals of this agreement.

Wait a minute you say...isn't this insider trading? Well, it might be except because I'm willing to give you all of the details, it's now public information. (You don't have to wonder why I'm bringing you this information. I can't make money with this idea unless I make it public first). Why haven't the other investment newsletter writers at www.pirateinvestor.com told you about this opportunity?

Frankly, they probably wouldn't touch this stock. They're free-market guys. They loathe the fact that this stock has a monopoly on its commodity product in the United States. And Porter Stansberry or Dan Ferris would tell you that this company's technology isn't cutting edge.

But, to me, that hardly matters, because - right or wrong - the company operates in the United States with a VIRTUAL MONOPOLY. It has persuaded Washington to slap a huge tariff on its foreign competition - a tariff that ensures it will operate profitably in the United States for at least the next five years. Furthermore, the company has landed a deal with the Russians for the raw materials it needs to reduce its production cost by 20% or more. All that's left is the government approval for the contract - which is coming on May 22nd, just in time for the Bush-Putin summit.

ARE YOU INTERESTED? WANT TO ROLL THE (LOADED) DICE WITH ME THIS MONTH?

Now...before I ask you if you're interested in this information, I have to make one thing perfectly, crystal clear. I'm not a Merrill Lynch stock analyst. I'm not hyping this thing to you because I'm trying to raise money for an IPO. No. I'm in the business of selling independent investment research...and frankly this is the best tip I've ever come across. And, because I make my living as a provider of unbiased information...I'm willing to sell you this information before I even establish a position in the stock myself. What could be fairer?

Unfortunately, there's one more thing I have to remind you about. I can't guarantee that the stock will pop. Nobody can guarantee the actions of the stock market. But, I can guarantee you (and Porter Stansberry has agreed to vouch for me and stand behind my guarantee) that everything I've told you here about the company is true and accurate. In fact, if you're interested in getting in on this deal, I'll provide you with a report IMMEDIATELY that proves everything I've said above. By that I mean:

#1. The financial position, history of the company and the balance sheet information is 100% correct

#2. The company's future financial situation has been accurately represented here.

#3. The company has historically paid a dividend. Currently it's paying $0.1375 per quarter, which judging by the current share price of $6.50 would equal an 8% yield for investors this year. (I can't guarantee that the company will continue to pay the dividend - only the board of directors could do that - but I can show you that the company has a solid history of paying dividends and the financial resources to continue to pay them).

#4. The deal I allude to here - with a Russian company - for a new, cheaper supply of raw materials, is, according to public company documents, finalized.

#5. U.S. government officials have said in public that a deal of the nature I've represented here will be announced at the upcoming Bush-Putin summit.

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Now, assuming for the moment that everything I'm able to guarantee is correct, how much would confirmation from a company insider be worth to you? Well, that depends on how much you have to invest doesn't it?

Let's say that you've got a small investment portfolio. Just $10,000. Could you stake all of it on a deal like this? I don't see why not. The company is trading for less than net current assets. It has plenty of cash and is paying an 8% dividend. The stock, by the way, is trending higher, from a low of around $4. This is no penny stock either: it does over a billion a year in sales.

I'm not asking you to bet the farm on a new drug or a new widget. This is a bricks and mortar company selling a widely used industrial commodity. This is a Warren Buffett kind of stock. Only I can tell you exactly when it should spike higher based on a major international news event...

How much is information like this worth to you?

A REPORT THAT COULD DOUBLE YOUR INVESTMENT DOLLAR IN A SINGLE DAY

I'm going to make this very easy for you. I'm not asking you to subscribe to my newsletter in exchange for this information. (I don't even write a newsletter). I'm not asking you to follow a trading system. (I don't have one). I'm not going to bother you with subsequent emails or follow-up phone calls. Nope.

This is a simple, one-shot deal. I'll simply give you immediate access to a full report on the opportunity, including all of the back up information you'd need to verify everything I've told you here.

If you're interested, and you think the price is fair, all you have to do is buy one four-page report. You can verify all of the details I'll provide with documents available via public records. I'll even give you an internet link to the company's most recent financial data.

And you can buy the report through a link at the bottom of this page. You'll have INSTANT ACCESS to the report. I can't make it any easier.

Let me repeat my offer: This blue chip, undervalued stock, which pays an 8% dividend, should double on May 22nd because of a key new commercial arrangement between the United States government and Russia. All the insiders are preparing to take profits...and you can join them.

So...what is this information worth?

Let's say you take my advice and I'm right on the money. Let's say - just for the sake of argument - that the stock hits a new all-time high. It goes to $14. You'd make 100% on your money - even after trading costs.

Now look, I know that a lot of you can afford to put a lot more than $10,000 on this kind of safe, high return play. It's not an option play. It's not a growth stock. It's not even a tech stock. Nope. It's a high

dividend paying commodity company. But even if you only have $10,000 to invest, I could help make you double that $10,000 in a few days. Heck, I can even tell you exactly which day to buy (May 21st) and sell (May 23rd). There's nothing else you'll have to do.

So...what price do you think is fair for this kind of information? How much would you pay?

Lots of people spend $10,000 or more for solid, profitable investment advice. After all, if you're making money with the information, it's worth it. But these services all require lots of trading...and lots of risk taking. With the deal I'm offering you today, all you have to do is buy one stock. And, as I've shown you, it's a low-risk stock.

Other services charge $5,000 or more for so-called "insider" connections. Conference call services, "angel" investment clubs and the like. And the deals always entail super high-risk bets that take YEARS to mature - if they ever do.

What I'm offering you today is far superior to both of these kinds of offers. It's low risk and it will come to fruition - one way or the other - this month. If the deal doesn't hit big, your capital won't be tied up forever and there's almost no chance you'll lose money because the company pays such a big dividend and is so undervalued relative to assets. Plus, its just one stock. There's not all of the work required to follow an investment "system."

So...what's a fair price? Honestly, I have no idea. It really depends on how much money you have to

invest. If you're going to put a million dollars on this - and you could - then the information is probably worth $50,000 or more. But I know most of you don't have that kind of money to play with (though some of you do). No matter how much you decide to invest. I'll give instant access to the information to anyone who cares to pay $1,000 for it. It's not cheap - but if we double our money this month - it's easily worth it.

And, by the way, I might not recommend stocks all that often, but I've been in and around the investment publishing business longer than Porter Stansberry, Steve Sjuggerud, and Dan Ferris combined. From time to time – as you see here – I come across very solid information. I hope you'll use this lead to your best advantage. Your friends won't understand your newfound interest in politics...and they won't know where you got the money for your new house, boat, car, and vacation either.

Sincerely,
Jay McDaniel

P.S. To buy this special INSIDER TIP report, just click here:

<http://pirateinvestor.com/Reports/350SSIT/DR/W350C504.cfm>

Appendix K

DOUBLE YOUR MONEY ON THE UPCOMING ARMS AGREEMENT: BUY USEC (NYSE: USU, $6.50)

Dear Investor,

Thank you for your interest in my special report. As you'll see, I've left no stone unturned for you.

But, if you're the kind of person who likes to buy first and ask questions later, call your broker now and tell him to buy shares of USEC (NYSE: USU, $6.50). The company is the leading vendor of enriched uranium in the United States. Enriched uranium is the fuel required by almost all nuclear power plants around the world.

The main advantage of nuclear power is its ability to derive enormous amounts of energy from a tiny amount of fuel. One metric ton of nuclear fuel can produce the equivalent of 2-3 million tons of fossil fuel. For example, one kilogram of coal can generate 3 kilowatt-hours of electricity. But one kilogram of nuclear fuel can generate 400,000 kilowatt-hours.

As our economy grows and becomes more energy dependent and as we seek to become less reliant on foreign oil supplies, nuclear power will undoubtedly play a role of growing importance to our economy. Today there are 107 active nuclear reactors in the United States. operating at about 90% of capacity. However, there's only one U.S. vendor of fuel for

these reactors: USEC. And, in total, the company sells fuel to 170 nuclear reactors around the world.

Let me briefly outline the bullish case for the company.

USEC has signed long-term fuel contracts with power companies around the world. However, the cost to USEC to fulfill these contracts is variable. In the past. the company has fulfilled demand for nuclear fuel via two sources - nuclear warheads from the U.S. and Russian arsenals and USEC's own uranium enrichment process.

This is a very big business. USEC recorded well over $1 billion in sales during each of the last four years. But, like any commodity business, USEC's profits are directly linked to its costs of production versus the market price of the commodity. Lately, due to increased production by the Western European providers - Eurodif and Urenco - the market price of enriched uranium fuel has fallen. At the same time, USEC's market advantage - a U.S. brokered deal to acquire Russian uranium from its nuclear weapons stockpile - hadn't envisioned changing prices. USEC's old deal with the Russians (first brokered in 1997) provides enriched uranium at fixed prices that are no longer economically beneficial to USEC because of the falling global price of uranium.

(By the way, nuclear fuel vendors sell uranium in units called - SWU - a Single Work Unit. It's the nuclear equivalent to a gallon of gasoline).

USEC negotiated a new, market priced, deal with its Russian supplier in May of 2000, but the supply of cheap uranium has been on hold for two years pending government approval of the deal. That squeezed USEC's profits.

Period Ending	31-Mar-02
Current Assets	
Cash and Cash Equivalents	$219,300,000
Net Receivables	$159,300,000
Inventory	$835,500,000
Other Current Assets	$20,100,000
Total Current Assets	$1,234,200,000
Long Term Assets	
Property Plant and Equipment	$608,700,000
Other Assets	$123,300,000
Deferred L.T. Asset Charges	$48,200,000
Total Assets	$2,014,400,000
Current Liabilities	
Accounts Payable	$210,100,000
Other Current Liabilities	$52,700,000
Total Current Liabilities	$262,800,000
Long Term Debt	$500,000,000
Other Liabilities	$268,200,000
Long Term Liability Charges	$31,300,000
Total Liabilities	$1,062,300,000
Stock Holders Equity	
Common Stock	$10,000,000
Retained Earnings	$14,700,000
Treasury Stock	[unintelligible]
Capital Surplus	$1,066,200,000
Other Stockholder Equity	[unintelligible]
Total Stockholder Equity	$952,100,000
Net Tangible Assets	$952,100,000

For example, back in 1999 the company was getting plenty of cheap Russian uranium. It had over $1.4 billion in SWU revenue that year ($1.5 billion in total revenue) and its cost of sales was a little over $1.18 billion. The company made $346 million in gross profit. That's pretty incredible for a company valued by the market today for less than half that amount.

On essentially the same demand for its product in 2001. the company had revenues of $1.1 billion (lower revenue total reflects the lower average sale price) but its cost of sales was $991 million. The company's margins – always thin in a commodity business - had begun to disappear. Net income was only $78.4 million.

The 2001 figures aren't terrible for a $600 million company...but they'd be a heck of a lot better if USEC could re-establish a cheap Russian supply of enriched uranium. And that's exactly what's going to happen on May 22nd.

Before I get to the details of the new Russian agreement, I want to go over some of the company's financial statements to justify what I told you earlier about the company.

USEC IS AN ASSET RICH COMPANY

First, here's the balance sheet from the company's most recent 10K. As you can see, the company has over $1.2 billion in current assets against only $262 million in current liabilities - an extremely liquid position. It also has over $2 billion in total assets against only $1 billion in total liabilities. I'm not

suggesting that you gamble on an Internet stock here. This company is an asset rich and cash rich company. (To see the full balance sheet, income and cash flow statements, visit this website: http://biz.yahoo.com/fin/1/u/usu.html)

There's only one thing about this balance sheet you should be cautious about - the inventory figures. USEC was originally a branch of the Department of Energy. Then in 1993 it became United States Enrichment Corporation, wholly owned by the U.S. Government. Finally USEC went public in a July 1998 IPO. Becoming a standalone public company. Almost all of its assets originally came from the government - including its stockpile of uranium. Recently. around $230 million worth of its uranium inventory was discovered to have elevated levels of technetium, ruining it as a fuel. This would devalue the stockpile considerably and force the company to take a charge against shareholder's equity. But. USEC and the Department of Energy have agreed on a process, including further sampling, to determine the actual amount of material that may be affected. This process is expected to be completed in the first half of 2002. After a determination is made on how much uranium is affected, the process of getting reimbursed by the Department of Energy will begin. There are legal and regulatory specifications that the government agreed to as part of the privatization process and there's good reason to expect the government can be made to reimburse the company for the defective materials, though no agreement has been reached yet. In other words, keep in mind that $230 million or so of those assets could be impaired.

Revenue

Quarters	1999	2000	2001	2002
Sep	307,900	230,900	226,800	300,500
Dec	422,400	447,600	387,100	560,100
Mar	260,400	281,800	243,100	249,400
Jun	537,900	529,100	286,900	
Totals	**1,528,600**	**1,489,400**	**1,143,900**	**1,110,000**

Note: Units in Thousands of U.S. Dollars

Earnings Per Share

Quarters	1999	2000	2001	2002
Sep	0.63	0.16	0.06	-0.06
Dec	0.32	0.36	0.26	0.12
Mar	0.16	0.25	0.56	0.05
Jun	0.41	-0.74	0.09	
Totals	**1.52**	**0.03**	**0.97**	**0.11**

keep in mind that $230 million or so of those assets could be impaired.

Besides a robust balance sheet, USEC also has a long and successful operating history. As you can see here, the company continues to deliver over a billion dollars a year in revenues and - even with the recent challenges to its Russian supply of enriched uranium - it has been posting positive earnings each year as a public company.

What could change these numbers radically in the future is a new deal with the Russians. And, in fact, such a deal has already been signed.

THE RUSSIAN DEAL

USEC plays an important role in nuclear disarmament. It is the U.S. government's agent in the nuclear warheads to nuclear fuel program. The original Russian deal was signed in April 1997, prior to the company's public offering and has a 20-year term. Over the life of the 20-year Russian contract, USEC expects to purchase approximately 92 million SWU derived from 500 metric tons of highly enriched uranium. So far 22.4 million SWU has been purchased.

In the past this Russian supply has been very important to the company's production. Purchases from the Russian Federation represented 52% of USEC's production total in 2001. And, pending approval of a new, market-based pricing agreement. USEC expects purchases of the Russian SWU will make up approximately 60% of its production total in

2002. But only if a new, market-based contract is approved. Until then the company has suspended the buying of Russian SWU.

As I mentioned. the good news is that USEC has already reached such an agreement with its Russian partner. A deal was signed in May 2000 that includes market-based pricing and runs through 2013. **But implementation of the agreement is subject to review and approval by the U. S. and Russian governments.**

The uncertainty about when this deal would be approved has led to the company's stock trading in limbo - and at very cheap prices – since early 2000 when SWU prices fell. A USEC senior executive has assured me that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said *"watch the stock on May 22nd."*

The media is confirming the tip.

From *The Wall Street Journal* May 8th, page A15: *"The centerpiece of the summit, to be held May 23-26 in Moscow and St. Petersburg, is likely to be the signing of a treaty cutting offensive nuclear weapons. The accord would reduce U.S. and Russian arsenals* to *between 1,700 and 2,200 warheads each, down from their present level at about 6,000* to *7,000; for the U.S. and 6,000 for Russia."* Just as importantly, the Russians need USEC's buying of their excess enriched uranium to continue because of the economic difficulties in Russia. As *The Wall Street Journal noted "an offer of contracts for [Russia's] economically distressed defense industry could help soften criticism that President Vladimir Putin has*

yet to gain any substantial benefits from his pro-Western policies." The USEC deal alone could send nearly a half billion dollars to Russia each year.

And the financial benefit to USEC is substantial too. Company representatives explain that American SWU prices are now between $105 and $107 per unit. With Russian enriched uranium. USEC's unit cost per SWU is less than $80. Without it. Their cost is roughly the current market price. Thus, the company stands to gain 20 percentage points of profit margin on around $1 billion in sale contracts – or $250 million in gross profit. All it needs are the politicians to sign off on the deal!

And that, according to my source, will happen - finally - on May 22nd.

With the deal in place, USEC should make between $150 and $200 million in net profits in 2003. These profits should continue too - the new deal with the Russians extends through 2013. Furthermore, demand for nuclear fuel is likely to increase during this time period. With only five global vendors of enriched uranium, it's not hard to imagine the cost of nuclear fuel rising in the future, creating growing profits over time for USEC.

Without the deal in place, USEC will probably clear $50 million or so in net profits next year. But, in either case, it's hard to imagine the company cutting its current dividend of $0.1375 per quarter. The company has plenty of cash. the ability to trim inventory, operational profits and a sales backlog of $5.4 billion.

That's why I consider this a safe speculation. It's hard to imagine investors getting hurt with this Stock at its current price - you're buying at roughly half of book value and you're getting paid 8% a year to wait until the Russian supply deal gets worked out. Hopefully, if my source is right, it won't take long...

Jay McDaniel
May 13, 2002

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Appendix L

Wingfield Steven

From: Porter Stansberry [porter@pirateinvestor.com]

Sent: Tuesday, May 14, 2002 11 :04 AM

To: Bill Bonner; Myles Norin; Laura Davis; Christoph Amberger; Addison Wiggin; Matt Turner

Cc: Mark Ford (compuserve); George Rayburn

Subject: $1,000 stock tip is selling: 107 so afar -

InsiderSpecialReport.pdf

Hi everyone,

About two weeks ago I stumbled onto some very good information (which is turning out to be correct) about a company called USEC that sells enriched uranium.

The upcoming arms reduction treaty between the U.S. and Russia would appear to open the door to a much cheaper supply of enriched uranium for USEC, which is currently paying an 8% dividend and valued at half of net assets.

Someone in the company - a confidential source - told me a specific date to watch the stock. Unfortunately, the company - which is heavily dependent on government favors (including new tariffs and this deal with the Russians) didn't meet the objectives of my newsletter. So I didn't include the stock in my newsletter or portfolio.

However, I couldn't pass up such great and potentially valuable information on what could be a very lucrative speculation. So...I wrote a promotion based on the information and the situation and put it out under Jody Madron's pen name - Jay McDaniel.

The promotion is below and I'll attach a PDF copy of the report to this email.

By the way, just before we sent this promotion to our file, Bush came out and announced that an arms control deal with the Russians would be signed in Russia in a few days. Nothing was announced by USEC on whether this definitely means a cheaper supply of uranium though. Thus, officially, we're still waiting for May 22nd.

And, please note this - USEC's shares popped at about 3:30 pm yesterday, after Bush made his announcement. But, the pop didn't come from us. We didn't send the promotion until 6:30 pm.

If you're interested in running the following promo I'm happy to split the revenues with you 50/50 -- which, according to Myles - is a fair deal because this is a one time shot sale only with no follow-on revenue.

But, I'd urge you to hurry. USEC will probably rush its announcement because of the attention we're bringing to the stock. In fact, their investor relationship person just called to find out what the hell is going on...

Regards,
Porter

****

Here's the promo:

THE BLAST
May 13, 2002

****

DOUBLE YOUR MONEY ON MAY 22ND
WITH THIS *SUPER INSIDER* TIP

****

Dear Investor,

I've recently learned the details of a major international agreement between the United States and Russia that will create more than $2.5 billion in profits for one small U.S. company.

Investors in this company are going to make a fortune -- for reasons that I can detail for you here. And, best of all, because of my source - a senior company executive - I can even tell you EXACTLY WHEN the deal will be finalized and announced to the public.

The deal will close on May 22nd, only a few days from now. The company involved is publicly traded - on the New York Stock Exchange - and it's currently paying an 8% annual dividend. Although the company has a billion dollars in net assets, it has been forgotten by

Wall Street and today it's valued for less than $600 million.

Meanwhile, reasonable projections see the upcoming deal adding at least $2.5 BILLION in profits to the company's bottomline. Although the market value of the stock could soar by four or five times (it's only a $7.00 stock), I'm conservatively estimating that the shares will double.

Let me show you why.

On May 23rd the United States and the Russian government will sign a new arms reduction agreement that will reduce the number of nuclear warheads around the world by around 10,000 Thousands of investors watching CNN or CNBC will see the ceremony, with all its pomp and circumstance, live from St, Petersburg, Russia. But only a handful of investors will have already profited on the behind-the-scenes-maneuvering that put one company in a position to make an outrageous profit on the new treaty.

If you follow politics closely, the upcoming U.S.-Russian summit probably isn't news to you. Details are already leaking out to the media. For example, on The Wall Street Journal's May 8th front-page: "the U.S. and Russia now appear on track to sign a nuclear arms reduction treaty at the-Bush-Putin summit." What you haven't read in the papers yet is how this deal will mean hundreds of millions of dollars in windfall profits for one company. In fact, on May 22nd - the day before the summit begins - shares in this stock should more than DOUBLE, as the new

agreement with the Russians will mean fat profits through the year 2013. A high-level corporate executive - someone definitely in a position to know - passed along the details to me. He explained how the deal would benefit his company – raising its profit margins by 20 percentage points. He even told me the precise day the deal would be announced.

This is the kind of insider information that could make you a lot of money. And you won't have to risk much either...

In fact, the company the question is already a terrific bargain. It's valued by the stock market for around HALF of net assets. It pays an 8% dividend annually. In each of the last four years it sold over a billion dollars worth of product. This year alone it will have over $150 million in cash flow thanks to excess inventory reductions. This is a profitable business, with or without a treaty with the Russians. Despite its assets, sales and terrific strategic position, the market values the entire company at less than $600 million because this is an "old-economy" stock.

In other words, you could probably DOUBLE your money on this stock as the stock market recovers - with or without the sweetheart deal the company has negotiated as part of the upcoming nuclear arms agreement. And, with the information I'm prepared to give you, you won't have to wait for the stock market to recover. This stock will probably double - and could even triple or more - on the news I know will be announced in a few days.

Make no mistake - my plan to double your money is extremely low risk. This is a billion dollar corporation (in sales) that's currently valued at less than $600 million and that pays an 8% annual dividend. I'm not even recommending the options on this stock - just the regular shares. If you can double your money in one day on a low risk speculation, why get greedy?

But, for just a moment, forget about the blue chip description, the 8% dividend, the Russian presidential summit - I'll fill in the details as we go.

Focus on doubling your investment dollar SAFELY on the back of an insider tip. I can even tell you exactly which day the pop in the stock should happen. Like I told you, it's a Wednesday later this month - May 22nd. The news will be all over CNN. The President of the United States will be involved. And one company - just one company - stands to gain at least $250 million in income each year for the foreseeable future (at least through 2013). Considering that the stock in question is only valued at $600 million today...well. I'm conservatively estimating that the stock will double. But it could certainly go up a lot more than that...

Again - this tip is for a single stock. It trades on the New York Stock Exchange. It pays an 8% dividend. It has a virtual monopoly on its business in the U.S. And I can tell you precisely when, why and how its shares should double later this month. Downside if I'm wrong? Most likely zero. After all, the stock is already trading at less than net assets and it's paying an 8% annual dividend. This could be the simplest, safest and easiest way you'll ever double or even

triple your money. Ever. And I'm going to give you a summary of the opportunity, right here in this email.

HOW TO MAKE A LOT OF MONEY, WITHOUT RISKING ANY (HINT: POLITICS)

I'm sure you're wondering – how is it possible to double your money on a safe stock in one day? How can you double or triple your money – in less than a month – without buying speculative stock or stock options? How can you make a killing without putting much at risk?

In a word, politics.

That's right. Living in the greater Washington D.C. metropolitan area has its distinct advantages. Recessions never hit this part of the country because the government never stops growing. And. the insider tips you get at the country clubs here have nothing to do with something as risky as venture capital. Instead, I hear about the dirty, but sometimes very profitable, world of politics.

Maybe you haven't heard about it yet, but the upcoming U.S.-Russia summit is big news here in D.C. President Putin will host President Bush for three days in Russia. According to my source - and backed up by rumors that have been reported in the mainstream press - the major announcement of this summit will be an important new strategic alliance between the United States and Russia, relating to nuclear stockpiles and a new strategic defense system to protect both our countries from nuclear missiles...

The company I'm passing along to you will be a direct beneficiary of this agreement, to the tune of billions of dollars in profits.

See how this works? It's a total insider deal. Money and favors in exchange for a fat deal with the Russians. Hey, I know it's dirty. But I don't make the rules and I don't run the company or involve myself in politics. On the other hand, I see nothing wrong with profiting from my insider knowledge of this deal and I don't think you should be ashamed to do so either.

It's a great opportunity. Let me give you a few of the details now.

THE DETAILS YOU NEED TO MAKE A QUICK (AND HUGE) PROFIT

First, the company that will profit at the expense of the Russians is well known and (obviously) well connected.

In fact, the company was spun out of the U.S. government in 1993, which helps to explain why it has so much access to the government corporate welfare trough. Let me reiterate: this is a major company, not some penny stock. On the balance sheet you'll find over $200 million in cash and over $800 million in inventory (some of which was just liquidated for over $150 million). Net assets are valued at more than $950 million. But - get this - today the stock trades for less than $600 million - despite paying an 8% dividend this year.

This is a major company that sells a critically important commodity all over the world. It has had over a billion dollars in sales for the last four years and positive earnings per share each of the last four years too.

So...what's wrong with this picture? If this is such a great company, why is the stock so undervalued?

Because without the upcoming deal with the Russians and the support it gets from the U.S. government (protective tariffs), its costs match its sales revenue. In other words, this company - absent its upcoming deal with the Russians - would probably only breakeven this year.

So...the market is a down on the company. But I know the deal with the Russians is about to go through...! Once the deal with the Russians goes through, the company's net margins should exceed 20% - netting it around $250 million per year, even if you assume its market doesn't grow at all!

And guess what? The deal with the Russians has ALREADY BEEN SIGNED. That's right. It's all done, locked up. Finished. The only thing that both sides are waiting on is the proper media event to announce this commercial cooperation between the Ruskies and us. It's a feel good thing. It's PR for the politicians. You know how the game works. The important work is done in advance. so that when the cameras are rolling, everything comes off without a hitch.

Who is my source? Well...I can't tell you, except to say that he is a senior executive inside the company. He is definitely in a position to know the intimate deals of this agreement.

Wait a minute you say...isn't this insider trading? Well, it might be except because I'm willing to give you all of the details, it's now public information. (You don't have to wonder why I'm bringing you this information. I can't make money with this idea unless I make it public first). Why haven't the other investment newsletter writers at www.pirateinvestor.com told you about this opportunity?

Frankly, they probably wouldn't touch this stock. They're free-market guys. They loathe the fact that this stock has a monopoly on its commodity product in the United States. And Porter Stansberry or Dan Ferris would tell you that this company's technology isn't cutting edge.

But, to me, that hardly matters, because - right or wrong - the company operates in the United States with a VIRTUAL MONOPOLY. It has persuaded Washington to slap a huge tariff on its foreign competition - a tariff that ensures it will operate profitably in the United States for at least the next five years. Furthermore, the company has landed a deal with the Russians for the raw materials it needs to reduce its production cost by 20% or more. All that's left is the government approval for the contract - which is coming on May 22nd, just in time for the Bush-Putin summit.

ARE YOU INTERESTED? WANT TO ROLL THE (LOADED) DICE WITH ME THIS MONTH?

Now...before I ask you if you're interested in this information, I have to make one thing perfectly, crystal clear. I'm not a Merrill Lynch stock analyst. I'm not hyping this thing to you because I'm trying to raise money for an IPO. No. I'm in the business of selling independent investment research...and frankly this is the best tip I've ever come across. And, because I make my living as a provider of unbiased information...I'm willing to sell you this information before I even establish a position in the stock myself. What could be fairer?

Unfortunately, there's one more thing I have to remind you about. I can't guarantee that the stock will pop. Nobody can guarantee the actions of the stock market. But, I can guarantee you (and Porter Stansberry has agreed to vouch for me and stand behind my guarantee) that everything I've told you here about the company is true and accurate. In fact, if you're interested in getting in on this deal, I'll provide you with a report IMMEDIATELY that proves everything I've said above. By that I mean:

#1. The financial position, history of the company and the balance sheet information is 100% correct

#2. The company's future financial situation has been accurately represented here.

#3. The company has historically paid a dividend. Currently it's paying $0.1375 per quarter, which judging by the current share price of $6.50 would

equal an 8% yield for investors this year. (I can't guarantee that the company will continue to pay the dividend - only the board of directors could do that - but I can show you that the company has a solid history of paying dividends and the financial resources to continue to pay them).

#4. The deal I allude to here - with a Russian company - for a new, cheaper supply of raw materials, is, according to public company documents, finalized.

#5. U.S. government officials have said in public that a deal of the nature I've represented here will be announced at the upcoming Bush-Putin summit.

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Now, assuming for the moment that everything I'm able to guarantee is correct, how much would confirmation from a company insider be worth to you? Well, that depends on how much you have to invest doesn't it?

Let's say that you've got a small investment portfolio. Just $10,000. Could you stake all of it on a deal like this? I don't see why not. The company is trading for less than net current assets. It has plenty of cash and is paying an 8% dividend. The stock, by the way, is trending higher, from a low of around $4. This is no penny stock either: it does over a billion a year in sales.

I'm not asking you to bet the farm on a new drug or a new widget. This is a bricks and mortar company

selling a widely used industrial commodity. This is a Warren Buffett kind of stock. Only I can tell you exactly when it should spike higher based on a major international news event...

How much is information like this worth to you?

A REPORT THAT COULD DOUBLE YOUR INVESTMENT DOLLAR IN A SINGLE DAY

I'm going to make this very easy for you. I'm not asking you to subscribe to my newsletter in exchange for this information. (I don't even write a newsletter). I'm not asking you to follow a trading system. (I don't have one). I'm not going to bother you with subsequent emails or follow-up phone calls. Nope. This is a simple, one-shot deal. I'll simply give you immediate access to a full report on the opportunity, including all of the back up information you'd need to verify everything I've told you here.

If you're interested, and you think the price is fair, all you have to do is buy one four-page report. You can verify all of the details I'll provide with documents available via public records. I'll even give you an internet link to the company's most recent financial data.

And you can buy the report through a link at the bottom of this page. You'll have INSTANT ACCESS to the report. I can't make it any easier.

Let me repeat my offer: This blue chip, undervalued stock, which pays an 8% dividend, should double on May 22nd because of a key new commercial

arrangement between the United States government and Russia. All the insiders are preparing to take profits...and you can join them.

So...what is this information worth?

Let's say you take my advice and I'm right on the money. Let's say - just for the sake of argument - that the stock hits a new all-time high. It goes to $14. You'd make 100% on your money - even after trading costs.

Now look, I know that a lot of you can afford to put a lot more than $10,000 on this kind of safe, high return play. It's not an option play. It's not a growth stock. It's not even a tech stock. Nope. It's a high dividend paying commodity company. But even if you only have $10,000 to invest, I could help make you double that $10,000 in a few days. Heck, I can even tell you exactly which day to buy (May 21st) and sell (May 23rd). There's nothing else you'll have to do.

So...what price do you think is fair for this kind of information? How much would you pay?

Lots of people spend $10,000 or more for solid, profitable investment advice. After all, if you're making money with the information, it's worth it. But these services all require lots of trading...and lots of risk taking. With the deal I'm offering you today, all you have to do is buy one stock. And, as I've shown you, it's a low-risk stock.

Other services charge $5,000 or more for so-called "insider" connections. Conference call services,

"angel" investment clubs and the like. And the deals always entail super high-risk bets that take YEARS to mature - if they ever do.

What I'm offering you today is far superior to both of these kinds of offers. It's low risk and it will come to fruition - one way or the other - this month. If the deal doesn't hit big, your capital won't be tied up forever and there's almost no chance you'll lose money because the company pays such a big dividend and is so undervalued relative to assets. Plus, its just one stock. There's not all of the work required to follow an investment "system."

So...what's a fair price? Honestly, I have no idea. It really depends on how much money you have to invest. If you're going to put a million dollars on this - and you could - then the information is probably worth $50,000 or more. But I know most of you don't have that kind of money to play with (though some of you do). No matter how much you decide to invest. I'll give instant access to the information to anyone who cares to pay $1,000 for it. It's not cheap - but if we double our money this month - it's easily worth it.

And, by the way, I might not recommend stocks all that often, but I've been in and around the investment publishing business longer than Porter Stansberry, Steve Sjuggerud, and Dan Ferris combined. From time to time – as you see here – I come across very solid information. I hope you'll use this lead to your best advantage. Your friends won't understand your newfound interest in politics...and they won't know where you got the money for your new house, boat, car, and vacation either.

Sincerely,
Jay McDaniel

P.S. To buy this special INSIDER TIP report, just click here:

<http://pirateinvestor.com/Reports/350SSIT/DR/W350C504.cfm>

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FYI NOTICE

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Here's the Report:

<<InsiderSpecialReport.pdf>>

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To REMOVE yourself from this list, send an email to blaspowr_unsub@agoramail.net/home.cfm?list=blaspowr

Appendix M

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 3, 2010

Mr. Bruce W. Sanford
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Washington Square, Suite 1100
Washington, DC 20036

Re: Pirate Investor LLC, et al.
v. Securities and Exchange Commission
Application No. 09A720

Dear Mr. Sanford:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on February 3, 2010 extended the time to and including March 11, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

Appendix N

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 3, 2010

Mr. Bruce W. Sanford
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Washington Square, Suite 1100
Washington, DC 20036

Re: Pirate Investor LLC, et al.
v. Securities and Exchange Commission
Application No. 09A720

Dear Mr. Sanford:

The application for a further extension of time in the above-entitled case has been presented to The Chief Justice, who on March 3, 2010 extended the time to and including March 26, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk